WHEAT FARMERS CASES

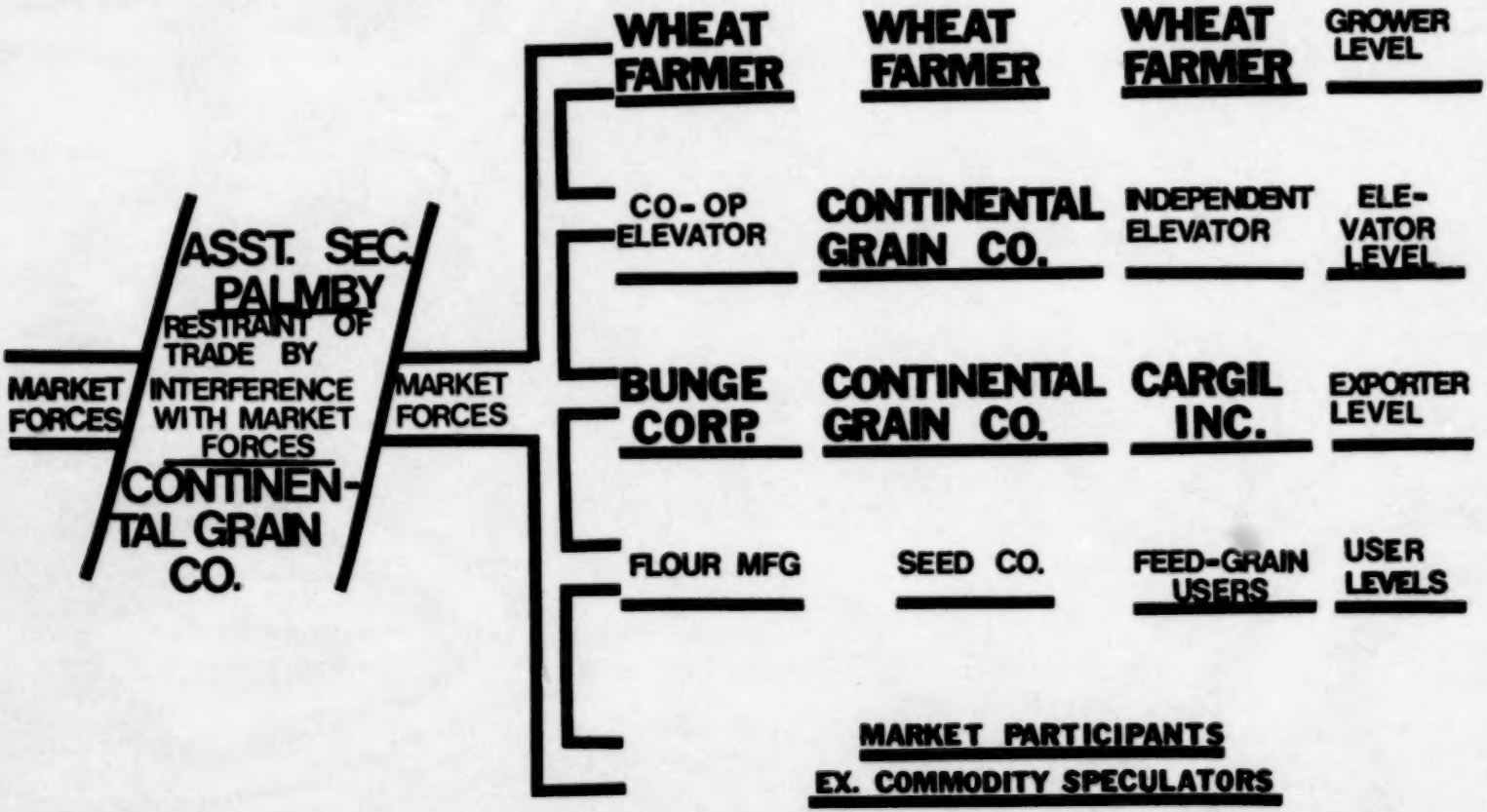

EXHIBIT A

ILLINOIS BRICK COMPANY v. ILLINOIS

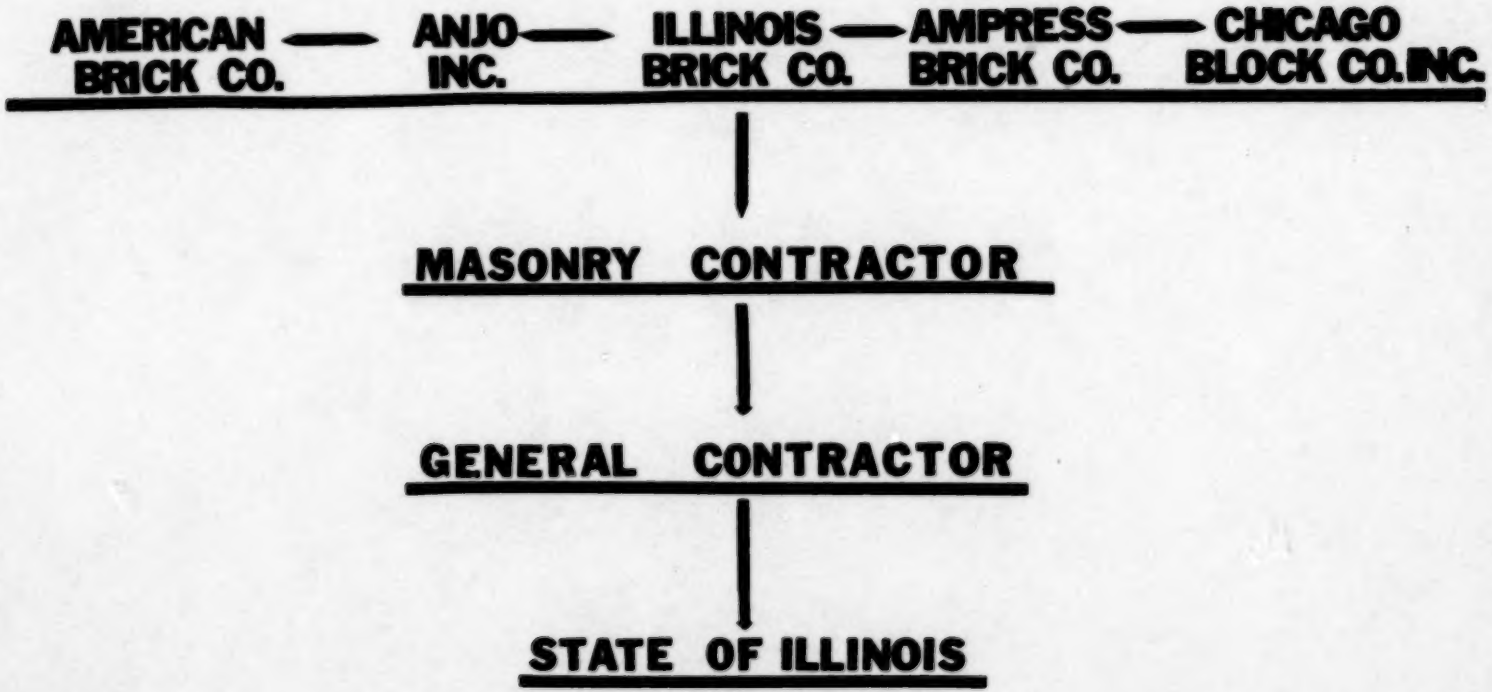

EXHIBIT B

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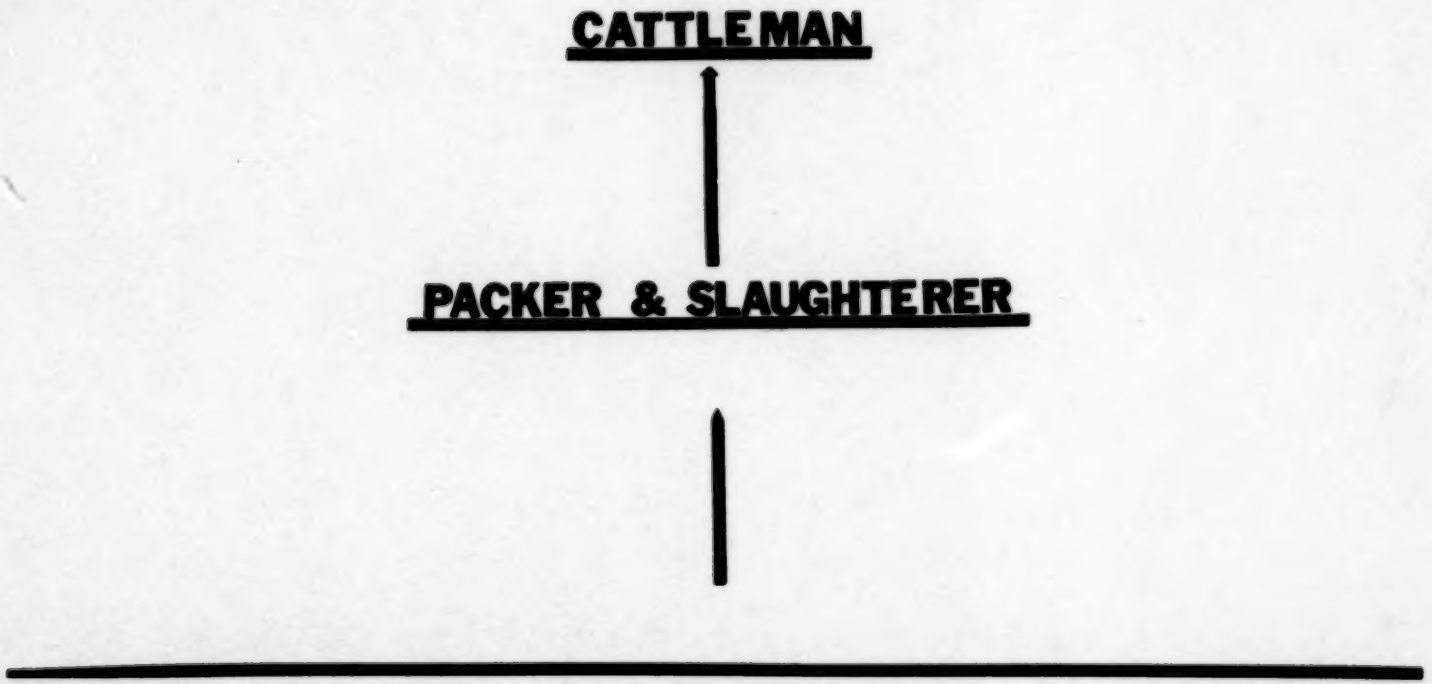

EXHIBIT C

81-1021
No. 81-.....

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,
Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,
Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

August 6, 1981

To: ALL COUNSEL

Re: No. 79-2296; 79-2310—In Re Wheat Farmers Antitrust Class Action Litigation

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

Enclosure

cc: Honorable Frederick A. Daugherty

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8-6-81 79-2296—79-2310

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Appeal from the United States District Court for the Western District of Oklahoma

(Filed August 6, 1981)

(D.C. No. CIV 73-779-D)

JOE ZINSER, et al., *Plaintiffs-Appellants,*

v.

CONTINENTAL GRAIN COMPANY, et al., *Defendants-Appellees.*

No. 79-2296 (Consolidated)

(D.C. No. CIV 73-780-D)

JOHN SPEARMAN, et al., *Plaintiffs-Appellants,*

v.

CONTINENTAL GRAIN COMPANY, et al., *Defendants-Appellees.*

No. 79-2310

(D.C. No. CIV 72-731-D)

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Plaintiffs-Appellants,

v.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Defendants-Appellees.

Joseph Alioto of Alioto & Alioto, San Francisco, California (James W. Witherspoon, Earnest L. Langley, Marion J. Craig III, and James E. Elliott of Witherspoon, Aikin & Langley, Hereford, Texas; and Michael T. Garrett of Law Offices of Michael T. Garrett, Clovis, New Mexico, with him on the brief), for Plaintiffs-Appellants in No. 79-2296; and (Frank Gregory, Tulsa, Oklahoma, and John M. Merritt of John M. Merritt, Inc., Oklahoma City, Oklahoma, for Plaintiffs-Appellants in No. 79-2310).

Mark H. Alcott (Simon H. Rifkind, Arthur L. Liman, and Lewis R. Clayton of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York; Judson S. Woodruff, Peter B. Bradford, John N. Hermes, and Lor Ann Ables of McAfee & Taft, Oklahoma City, Oklahoma; Neal E. Ar[illegible] of Culton, Morgan, Britain & White, Amarillo, Texas, Attorneys for Defendant-Appellee Continental Grain Company; and Robert J. Emery and James M. Gaitis of Robert J. Emery & Associates, Oklahoma City, Oklahoma, Attorneys for Defendant-Appellee Clarence D. Palmby, on the brief).

Before SETH, Chief Judge, and McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

These three antitrust cases were brought by wheat farmers in Oklahoma, Texas, and New Mexico against six grain export companies and a former governmental official. The two defendants named in all three complaints are Continental Grain Company, a Delaware corporation with its principal place of business in New York City, and Clarence D. Palmby, a former Assistant Secretary of the United States Department of Agriculture.[1] The central issue in

[1] The other five grain companies, named as defendants in only one of the three cases, are Cargill, Inc.; Louis Dreyfus Corp.; Cook Industries, Inc.; Garnac Grain Co., Inc. and Bunge Corp. These companies are named as defendants in the case in which Edgar W.

these consolidated appeals is the applicability of Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). The trial court ruled that *Illinois Brick* controlled and dismissed all three actions. The plaintiffs appeal.

The three complaints with which we are concerned were filed between October, 1972, and January, 1973, in the United States District Courts for the Western District of Oklahoma and the Northern District of Texas. In November, 1973, the cases were consolidated for pretrial proceedings in the Western District of Oklahoma by order of the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 (1976). In re Wheat Farmers Antitrust Class Action Litigation, 366 F.Supp. 1087 (J.P.M.L. 1973).[2]

The trial court on June 30, 1975, certified three classes, consisting of wheat farmers who had sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following geographic areas: (1) the state of Oklahoma

---

Cleveland, an Oklahoma wheat farmer, is the named plaintiff representing Oklahoma wheat farmers. *See* note 3 *infra*.

Continental Grain and Clarence D. Palmby, former Assistant Secretary of the United States Department of Agriculture, were named as defendants in all three cases. A central allegation is that Palmby, who was hired by Continental after the grain sales were completed, was bribed by Continental. According to the plaintiffs' theory, Palmby exchanged confidential government information about the grain sales for a position with Continental.

[2] In addition to the decision consolidating these cases, there have been two other published opinions during the nine-year history of this litigation. In re Wheat Farmers Antitrust Class Action, 440 F. Supp. 1022 (D.D.C. 1977), was a case in which Judge Sirica considered a motion to produce certain documents, which the Government claimed were classified and subject to a claim of executive privilege. Cleveland v. Palmby, 75 F.R.D. 654 (W.D. Okla. 1977), dealt with the taking of a deposition of an employee of defendant Cook Industries, Inc.

(the Cleveland case); (2) thirty-four counties in the Northern Panhandle region of the state of Texas (the Zinser case); and (3) Curry County, New Mexico (the Spearman case).[3]

The three complaints here involved are almost identical in their content. In each instance the action was instituted under the authority of sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22 (1976) to recover treble damages for violations of the antitrust laws. Cleveland alleged only antitrust violations under section 1 of the Sherman Act, 15 U.S.C. § 1. Zinser and Spearman alleged violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976).[4]

The central allegation of all three complaints is that Continental Grain Company and Clarence Palmby, and others, conspired in 1972 to suppress information regarding impending wheat sales to the Soviet Union. The Plaintiffs' theory of the case is that this conspiracy resulted in a de-

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[3] The three cases were:

(1) Cleveland v. Palmby. Named Plaintiff Edgar W. Cleveland represented a class of about 43,000 Oklahoma wheat farmers. In addition to Continental and Palmby, there were five other grain companies which were named as defendants. *See* note 1 *supra*.

(2) Zinser v. Continental Grain Co. Named Plaintiff Joe Zinser represented a class of about 12,000 wheat farmers in thirty-four designated counties in the Panhandle and adjacent areas of north Texas.

(3) Spearman v. Continental Grain Co. Named Plaintiff John Spearman represented between 600 and 1,500 wheat farmers in Curry County, New Mexico.

[4] The injury complained of was the same in each instance, *i.e.*, that, because of the alleged conspiracy, the plaintiffs sold their wheat at artificially depressed prices. In practical effect, all of the claims amount to contentions that, because of the defendants' actions, prices were fixed at artificially low levels, thereby benefitting the defendants to the detriment of the several plaintiffs.

pressed market condition, thereby allowing Continental Grain and other grain exporters, to buy wheat from "middlemen"[5] at lower prices that would have been the case if the information had not been suppressed. According to the complaints, since the middlemen sold wheat to the grain exporters at lower prices than would have been paid in the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices. It was on this general theory that the plaintiffs claimed antitrust violations and treble damages.

Needless to say, there was extensive discovery. It eventually developed during the course thereof that none of the three named plaintiffs sold any wheat directly to any defendant during the time period here involved. Instead, each sold to a middleman, who in turn sold to Continental Grain, or some other grain exporter. Furthermore, discovery also disclosed that the vast majority of the class members did not sell to any defendant, but rather sold their wheat to middlemen, who, in turn, sold either to someone else in the distribution chain, or to one of the defendants. In fact, not more than ninety-two members of the Cleveland class, consisting of 43,000 Oklahoma farmers, sold directly to Continental; not more than 212 members of the Zinser class, consisting of 12,000 Texas farmers, sold to Continental; and only sixty-two members of the Spearman class of between 600 and 1,500 New Mexico farmers sold directly to Continental.[6]

As mentioned, the instant cases were instituted in 1972 and 1973, and were certified as class actions in 1975. Dis-

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[5] Midddlemen include such entities as county grain elevator companies and farmer co-operatives.

[6] These numbers were supplied by counsel for Continental at the request of the District Court. The information was taken from Continental's records.

covery continued unabated throughout this time, and after. Then, on June 9, 1977, the Supreme Court announced its decision in *Illinois Brick*. In order to allow the parties an opportunity to consider the applicability of *Illinois Brick*, the trial court granted an extension of time to permit additional discovery and submission of briefs on the matter. The trial court also held a hearing at which counsel presented their respective positions on the matter. Finally, on June 25, 1979, the trial court entered an order holding that *Illinois Brick* applied to the instant cases and was in fact dispositive thereof. More specifically, the trial court held that *Illinois Brick* precluded an antitrust action by one who was only an "indirect seller" to the defendants, an "indirect seller" being one who did not deal directly with any defendant, but rather sold his wheat to a middleman who, in turn, sold either to a defendant or to some other link in the distribution chain.

As above indicated, none of the three class representatives, *i.e.*, Cleveland, Zinser,, or Spearman, sold his wheat directly to any defendant, and there were only a total of not more than 366 farmers in all three classes who sold their wheat directly to the defendants. The trial court found that, under the circumstances, a continuation of the class actions was not warranted. Accordingly, with the three class representatives unable to proceed further under *Illinois Brick*, the trial court, applying Fed. R. Civ. P. 23(a), declined to recertify the classes. The trial court then dismissed all actions "without prejudice."

Both the plaintiffs and defendants filed timely motions under Fed. R. Civ. P. 59. These motions were disposed of by order on November 13, 1979. In that order the trial court adhered to its earlier ruling that *Illinois Brick* barred recovery by all persons who did not sell their wheat directly to one of the defendants during the pertinent time frame. The trial court also adhered to its earlier ruling that, all factors considered, those relatively few farmers who had sold their wheat directly to one of the defendants during

the pertinent time period would not be allowed class certification.

Numerous matters not referred to in the trial court's order of June 25, 1979, were raised by the Rule 59 motions and disposed of in the order of November 13, 1979. Specifically, the several plaintiffs sought leave to amend their pleadings so that the actions could proceed as ones based on fraud and deceit and civil conspiracy, with jurisdiction based on diversity. The trial court denied this request on several grounds, the primary one being that the request to amend came "too late," namely, some seven years after commencement of the litigation, and that the cases from their inception were based on alleged antitrust violations. In the same vein, the trial court noted that even after *Illinois Brick* was announced, the plaintiffs made no effort to amend until the trial court determined that *Illinois Brick* barred the present proceeding. The trial court also declined to award the plaintiffs their costs or attorney fees on the ground that they had not prevailed. Zinser and Spearman by their post-trial motion requested that their cases be transferred back to the United States District Court for the Northern District of Texas. This request was also denied.

Finally, a request was made that the trial court vacate a protective order entered on January 4, 1974. That order precluded all the named parties and counsel from initiating any communication with the class members without the prior permission of the court.[7] This order was apparently entered by consent of all parties. In his post-trial motion counsel for the plaintiffs asked that the order be rescinded

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[7] All parties and their lawyers were ordered not to *initiate* any communication with potential and actual class members who were not named parties. The order, which was proposed by counsel for the defendants, specifically stated that the lawyers *were* permitted to communicate with prospective clients when the contract was initiated by the prospective client rather than the attorney. The order was aimed a preventing client solicitation.

so that the members of the three classes could be advised as to the current status of the case. The trial court denied this request.

The defendants also filed a post-judgment motion under Rule 59(e) and 60(a), requesting clarification of the June 25, 1979, order. The trial court granted this motion and amended its earlier order to provide that the claims of all members who did *not* sell directly to any defendant were dismissed *with* prejudice, and that the claims of those who *did* sell directly to a defendant were dismissed *without* prejudice. Plaintiffs next filed a timely notice of appeal.

As indicated at the outset, the central issue concerns the applicability of *Illinois Brick*. The appellants' basic position is that *Illinois* Brick simply does not apply. The trial court did not agree with this argument. Nor do we.

In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, *rehearing denied*, 393 U.S. 901 (1968), the precursor of *Illinois Brick*, the plaintiff, a shoe manufacturer, sought treble damages from the defendant, a manufacturer and distributor of shoe machinery. The plaintiff, who was a customer of the defendant, alleged that the defendant had monopolized the shoe machinery industry and unlawfully initiated the practice of only leasing some of its machinery to the plaintiff, rather than selling it outright to the plaintiff. As a result, according to the plaintiff, there was, in effect, an overcharge, which was the difference between what the plaintiff paid defendant in shoe machine rentals and what it would have paid had defendant been willing to sell the machines. 392 U.S. at 483-84.

The defendant in *Hanover Shoe* claimed that the plaintiff had suffered "no legally cognizable injury," since the plaintiff had passed on any illegal overcharge to its customers in the form of a higher price on its shoes. The District Court rejected this pass-on defense, and the Court of Appeals affirmed. On certiorari, the Supreme Court also affirmed. The Supreme Court held that when a buyer shows

that the price paid by him is illegally high, and also shows the amount of such overcharge, he has made out a *prima facie* case of injury and damage under section 4 of the Clayton Act, and that the fact that the buyer may have later passed on the amount of the overcharge to his customers does not defeat his cause of action. In other words, a pass-on theory could not be used by way of defense.

In *Illinois Brick*, the plaintiffs attempted to use a pass-on theory by way of offense. There the plaintiffs, the State of Illinois and 700 other governmental entities, claimed treble damages on the ground that the defendants had engaged in a price-fixing conspiracy. The plaintiffs' theory was that the defendants, concrete block manufacturers, overcharged "middlemen" to whom they sold their blocks, with the middlemen then passing on the overcharge to the plaintiffs, which had not dealt with the defendant.[8] Extending the rule of *Hanover Shoe* in what is believed to be a symmetrical fashion, the Supreme Court ruled that a pass-on theory

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[8] The defendants in *Illinois Brick* manufactured concrete blocks and sold them primarily to masonry contractors. The masonry contractors, in turn, submitted bids to general contractors for the masonry portions of construction projects. The general contractors submitted bids to the plaintiffs, which were the State of Illinois and 700 other governmental entities, including counties and cities. 431 U.S. at 726.

The distributive chain in *Illinois Brick*, therefore, resembles that which often exists in the wheat industry, at least in the number of links in the distributive chain. The wheat farmers often sell to county grain elevator companies, which, in turn, sell to larger companies, which sell to the defendants. This is not always true, since, in some cases, farmers sell directly to the defendants grain companies. In other cases, farmers deal directly with farmer cooperatives. Also, the wheat sometimes is handled by only one middleman, who, in turn, deals with the defendants. As indicated, however, in many cases there are four links in the distributive chain, just as there are in the concrete block industry which was scrutinized in *Illinois Brick*.

could not be used offensively by an indirect purchases against an alleged violator of antitrust laws.[9]

From *Illinois Brick,* we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator. We recognize that in *Illinois Brick* the plaintiff were buyers, whereas, in the instant cases, the plaintiffs are sellers. Such fact, however, does not render the rule of *Illinois Brick* inapplicable. In the instant case, the claim is that, because the defendants violated antitrust laws, they were able to buy wheat at depressed prices from middlemen, and that the middlemen, in turn, purchased wheat from the plaintiffs at reduced prices. In *Illinois Brick,* an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, *i.e.,* one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities.

A case applying the general rule of *Illinois Brick* to a fact situation similar to the present one is In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *rehearing denied,* 616 F.2d 659 (5th Cir.), *cert. denied,*

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[9] Passing-on often means the process in which a buyer shifts all of an overcharge to the next link in the distributive chain. For example, a wholesaler who was overcharged by the manufacturer from whom he bought goods would simply add to the purchase price a certain amount to reflect mark-up for costs and profits. The resulting sum would be the price which the wholesaler would charge to the retailer to whom he sold the item. In this example, the overcharge is simply "passed on" from the wholesaler to the retailer, since it is reflected in the wholesaler's charge to his customer, the retailer.

The wheat farmers allege the coverse of the above example. *I.e.,* instead of passing on an overcharge, those in the wheat distribution chain allegedly passed on an undercharge, or an artificially low price, which was the result of an illegal conspiracy between the defendants.

Safeway Stores, Inc. v. Meat Price Investigators Assn., 101 S.Ct. 280-81 (1980). There the plaintiffs were ranchers and feeders, or both. The defendants were twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication. The plaintiffs alleged that the defendants combined to fix at artificially low levels the prices at which they purchased beef from slaughterhouses and meat packers, which in turn, caused the plaintiffs to receive less for their cattle sold to the meat packers. Although the plaintiffs did not deal directly with any defendant, it was their theory that they received less for their cattle which they sold to the slaughterhouses because of the defendants' antitrust activity.

In *Beef Industry,* as here, the plaintiffs' basic position was that *Illinois Brick* simply had no applicaiton. The Fifth Circuit rejected this argument and held that the general rule of *Illinois Brick* did not apply, and that such would bar the plaintiffs, none of whom had sold cattle to any defendant, from recovery in an antitrust action. We recognize that the Fifth Circuit went on to hold that the plaintiffs came within an exception to the *Illinois Brick* rule. However, in our view, the plaintiffs in the present case do not come within any exception to the rule. The relevance of *Beef Industry* is that the rule of *Illinois Brick* precludes an antitrust action by a seller who alleges price-fixing by a defendant with whom he has not dealt directly, unless the seller can bring himself within some exception to the general rule.

As indicated, there are exceptions to the *Hanover-Illinois Brick* rule. In *Hanover Shoe,* the Supreme Court recognized that if the plaintiff in that case, who had dealt directly with the defendant, had a pre-existing cost-plus contract with its customer, then a pass-on theory of defense might be permitted. Similarly, in *Illinois Brick,* where the plaintiffs had not dealt with the defendants, the Supreme Court again recognized that if the plaintiffs in that case

had a pre-existing cost-plus contract with the middlemen, which they did not, then the plaintiffs could have used the pass-on theory offensively, *i.e.*, they would have had a cause of action against the defendants with whom they had no direct dealings. Also, in *Illinois Brick*, the Supreme Court further recognized that the pass-on theory might be permitted "where the direct purchaser is owned or controlled by its customer."

Recognizing that the Fifth Circuit in *Beef Industry* held that the plaintiffs came within an exception to the rule of *Illinois Brick*, we do not believe the plaintiffs in the instant case have brought themselves within any such exception. In *Beef Industry*, the Fifth Circuit held that there was the "functional equivalent" to a pre-existing cost-plus contract. In thus holding, the Fifth Circuit relied on the allegation that in buying live cattle the packers strictly applied a set formula to a Yellow Sheet reflecting the defendants' wholesale beef prices. We find nothing comparable in the instant case. Be that as it may, the Supreme Court has indicated that exceptions to *Illinois Brick* are exceedingly narrow in scope, and, we believe, should be few in number. In our view, any exception should not be given an expensive application, lest it swallow the rule and become the rule itself.[10]

As indicated, in its order of June 25, 1979, the trial judge not only held that *Illinois Brick* applied to all who had not

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[10] In support of our strong belief that any exception to the rule of *Illinois Brick* should be narrow in scope, *see* Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3rd Cir. 1979). There the Third Circuit held that indirect purchasers of consumer bags could not recover treble damages from the manufacturer of the bags in the absence of proof that there were pre-existing fixed quantity, cost-plus contracts at each level of distribution between the direct purchasers from the defendant manufacturer and the plaintiffs, and that therefore the plaintiffs had absorbed the illegal overcharge in its entirety.

themselves dealt with Continental, but also refused to certify as a class those who had dealt directly with Continental. It is conceded that the question of whether those persons who sold to the defendants should have been certified as a class was a discretionary matter. Our study of the matter convinces us that the trial judge considered all relevant factors and did not abuse his discretion when he refused to certify.[11]

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[11] Fed. R. Civ. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Judge Daugherty found the classes should not be recertified because, *inter alia*, the vast majority of potential class members were eliminated as plaintiffs. Therefore, the number of direct sellers was not large enough to meet the numerosity requirement. Further, he found that the test for meeting that requirement is not one of numbers alone, "but rather a determination of impracticability of joinder." *See, e.g.*, Bennett v. United States, 266 F. Supp. 627 (W.D. Okla. 1965).

More importantly, since none of the named plaintiffs sold directly to the defendants, there were no class representatives. In the Oklahoma case, there apparently was no volunteer to replace Cleveland. While there apparently were proposed new class representatives in the other two cases, the court found that the proposed substitutes had not shown "that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interests." So there were no class representatives for the proposed new classes and the lower court acted properly in refusing to certify.

See also Sosna v. Iowa, 419 U.S. 393, 403 (1975); Holt v. Moore, 541 F.2d 460, 462 (4th Cir. 1976); Britt v. McKenney, 529 F.2d 44, 45 (1st Cir.), *cert. denied*, Burden v. McKenney, 429 U.S. 854 (1976).

By timely post-trial motions, the parties raised several matters, some of which apparently had not been previously urged. All were denied, and plaintiffs suggest that such action constitutes error.

Specifically, after the trial court had ruled that *Illinois Brick* applied, the plaintiffs sought leave to amend their pleadings so as to include claims based on fraud and deceit or civil conspiracy with jurisdiction based on diversity. In this regard the plaintiffs assert that such claims were, in reality, already pleaded and amendment was not actually necessary. We do not agree.

The present causes of action were clearly based only on antitrust statutes, and the request to amend the pleadings to include claims based on state law was not made until after the trial court ruled that *Illinois Brick* applied. To hold that the present complaints set forth not only claims for antitrust violations but also claims for fraud and deceit would reduce the rules of pleading to a shambles. Suffice it to say, the trial court did not abuse its discretion in refusing to allow the plaintiffs to amend their complaints so as to include additional and different claims. For seven years the matter had proceeded as an antitrust case, and it was too late to convert the present proceedings to something different. In *Beef Industry,* the Fifth Circuit also held that the trial court did not abuse its discretion in denying post-judgment motions to amend. *See also* Summit Office Park, Inc. v. United States Steel Corp., 639 F.2d 1278 (5th Cir. 1981), in which dismissal was based on *Illinois Brick* and the denial of a motion to amend was held not to constitute an abuse of discretion.

Other matters raised on appeal need not be considered in any detail. The trial court did not err in refusing to transfer the Zinser and Spearman cases back to the Northern District of Texas. This request was only made after the handwriting was on the wall. Similarly, the trial court did not err in denying plaintiffs' request for attorney fees.

Because of a recent Supreme Court decision, one final matter requires comment. As indicated, the trial judge in 1974 entered a protective order requiring the named parties and counsel to obtain court permission before contacting members of the class. We are advised that such order was in accord with the practice at that time, and that there was no objection to the entry of such an order. However, in their post-judgment motion the plaintiffs asked that the order be lifted. The trial court denied the request, and the matter is raised on appeal.

In Gulf Oil Co. v. Bernard, 49 U.S.L.W. 4604 (June 1, 1981), the Supreme Court held that an order similar to the one in the instant case was inconsistent with the general policies embodied in Fed. R. Civ. P. 23, and that any order of this type must be based on a "clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." In view of *Gulf*, the protective order should not have been entered, and, upon subsequent request, should have been vacated. All of this, of course, is by way of hindsight. But to clear the record, that portion only of the trial court's judgment is reversed. In all other regards, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

September 4, 1981

To ALL COUNSEL

Re: No. 79-2296, Zinser, et al, v. Continental Grain Company
No. 79-2310, Cleveland v. Palmby, et al

Dear Counsel:

Enclosed is a copy of an order entered in the captioned case today.

Very truly yours,

HOWARD K. PHILLIPS
Clerk

By: /s/ [Illegible]
Deputy Clerk

dvc

JULY TERM—September 4, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

No. 79-2310

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Plaintiff-Appellant,

vs.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Defendants-Appellees.

JOE ZINSER, *Plaintiff-Appellant,*

vs.

CONTINENTAL GRAIN COMPANY, *Defendant-Appellee,*

No. 79-2296

JOHN SPEARMAN, *Plaintiff-Appellant,*

vs.

CONTINENTAL GRAIN COMPANY, *Defendant-Appellee,*

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing en banc in the captioned causes.

Upon consideration whereof, the petition for rehearing are denied by the panel to whom the cases were argued and submitted.

The petitions for rehearing have been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied. Circuit Judge Holloway did not participate in the en banc proceedings.

/s/ Howard K. Phillips

Howard K. Phillips, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
Civ. 72-731-D
Civ. 73-779-D
Civ. 73-780-D

IN RE: WHEAT FARMERS ANTITRUST
CLASS ACTION LITIGATION

ORDER

(Filed June 25, 1979)

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the announcement of the Soviet purchase was made. The Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for losses they allegedly sustained when they sold their wheat on the open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 relating to

multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Spearman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case the grain companies Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company, and Bunge Corporation.

On June 30, 1975, the Court certified the cases involved to be maintained as class actions on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

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[1] As indicated in the Court's Order filed on June 30, 1975, the classes involved are as follows:

Cleveland—"All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser—"All wheat farmers in 34 designated counties in Texas

Subsequent to the certification of the cases in this action as class actions, the United States Supreme Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In *Illinois Brick*, the Supreme Court held that indirect purchasers, whose only claim of injury is that an illegal overcharge has been passed on to them, are not persons injured by an antitrust violation [2] and cannot recover under Section 4 of the Clayton Act except in extremely limited circumstances.[3]

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located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman—"All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

[2] In *Illinois Brick*, the Supreme Court refused to overturn its 1968 ruling in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), which severely restricted the circumstances in which the pass-on of illegal overcharges may be proved. While Hanover *Shoe* dealt with the defensive use of pass-on by a defendant trying to show that the plaintiff, the first purchaser, had suffered no actual injury, *Illinois Brick* applied the same principles to bar the offensive use of pass-on by an indirect purchaser seeking to establish that it, and not the first purchaser, was the party harmed. The Supreme Court thus rejected the offensive, as well as the defensive, use of the pass-on theory. *See generally*, Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Columbia L. Rev. 979, 998 (1977).

[3] The Supreme Court in *Illinois Brick* noted the exception recognized in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra*, "that there might be situations—for instance, when an overcharged buyer has a pre-existing, 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Hanover Shoe*, 392 U.S.

Upon study of the *Illinois Brick* decision, the Court tentatively concluded that the ruling in that case was applicable to this litigation. In a letter dated March 16, 1978, the Court informed the parties in this action that it appeared that the ruling in *Illinois Brick* suggested that a reconsideration of the certified classes in this litigation might be necessary and directed the plaintiff class representatives to file a statement with reference to whether their respective classes contained any direct sellers of wheat to a defendant grain company and the approximate number of such direct sellers in each class. The Court indicated that where there existed a viable class in a case and the present plaintiff class representative was not a member of the viable class, a substitution of the plaintiff class representative would appear to be appropriate and necessary.

An examination of the record reveals that none of the original plaintiff class representatives herein sold their wheat directly to the defendant grain companies during the time period involved in this action. By letter dated March 22, 1978, counsel in the Zinser case indicated that they expected to substitute Jack Williams as the plaintiff class representative in that case. By letter dated March 28, 1978, counsel in the Spearman case indicated that T. M. Bordon might be substituted as the plaintiff class representative in that case. A substitute class representative has not been named and presented for the Cleveland case.

In a letter dated May 26, 1978, counsel for Continental Grain indicated that Continental Grain's records revealed that there were 62 members of the class in the Spearman

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at 494. *See Illinois Brick*, 431 U.S. at 735-36. It is also mentioned in *Illinois Brick* that "[a]nother situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id.*, 431 U.S. at 736 n. 16.

case who sold wheat directly to Continental Grain; that not more than 212 members of the class in the Zinser case sold their wheat directly to Continental Grain; and that not more than 92 members of the class in the Cleveland case sold their wheat directly to Continental Grain.

On August 23, 1978, Plaintiffs Zinser and Spearman filed a Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order. Plaintiff Cleveland has not joined in this motion. In connection with said motion, Defendant Continental Grain and Plaintiffs Zinser and Spearman have filed several letters, briefs and exhibits in support of their respective contentions.

In their motion, Zinser and Spearman first move the Court for permission to make and include as members of the class of farmers who sold wheat directly to Continental Grain the farmer cooperatives who handled the farmers' wheat during the relevant time period. In the alternative, they move the Court for the right to ascertain from the farmer cooperatives the names of the individual farmers who sold their grain to Continental Grain through farmer cooperatives. Zinser and Spearman contend that wheat farmers who sold their wheat to a defendant grain company through a farmer cooperative should be considered as direct sellers to the grain companies so as to fall within the rule in *Illinois Brick* and that the farmer cooperatives, as the representatives and sellers of grain for the farmers, should be made members of the classes in this action, representing those farmers who owned the cooperatives and for whom they acted to sell wheat directly to the defendant grain companies.

The Court concludes that Zinser and Spearman's motion should be overruled. To the extent said motion requests an

extension of time for additional discovery, the Court has already permitted such an extension. As Continental Grain has indicated those class members who sold wheat directly to it, there is no need for a further extension of time for additional discovery. Plaintiffs' request for the Court to consider the class members who sold wheat to a defendant grain company through a farmer cooperative to be direct sellers to the defendant grain companies is denied. Such a situation does not come within the narrow exceptions set forth in *Illinois Brick*. The Plaintiffs have not shown that there were pre-existing, fixed-quantity, cost-plus contracts at each level of distribution between the Defendants and the members of the classes herein. Nor have they shown that the entities to whom the wheat farmers directly sold their wheat were owned or controlled by the defendant grain companies. As an incorporated farmer cooperative is a legal entity separate and apart from its members, *see* 18 Am.Jur.2d *Cooperative Associations* § 3 (1965), a wheat farmer who sells wheat to a cooperative which in turn sells the wheat to a grain company is an indirect seller of the wheat to the grain company and is precluded by the ruling in *Illinois Brick* from having a remedy under § 4 of the Clayton Act. Plaintiffs' request that the Court make the farmer cooperatives who sold wheat directly to a defendant grain company a new class in this action is also denied. No cooperatives are named as members of the certified classes in this action nor have any cooperatives sought to intervene herein. Moreover, as any antitust claims a farmer cooperative might have against the defendant grain companies arising out of the time period involved in this action may possibly be barred by the four-year antitrust statute of limitations, it would be inappropraite for the Court to add the cooperatives as members of the classes in this case.

Plaintiffs have on several occasions urged the Court to defer resolution of the application of *Illinois Brick* to this action pending possible legislative action to override *Illi-*

nois Brick. It has now been over two years since the Supreme Court rendered its decision in *Illinois Brick*, yet no legislation has been enacted to override that decision. Given the present uncertain status of any such legislative efforts, the Court finds no basis for a further delay in determining the applicability of *Illinois Brick* to this litigation. *Illinois Brick* remains the law and, if appropriate, must be applied in this case.

The Court has conducted a hearing on the possible recertification of the classes in this action in light of *Illinois Brick*. Upon consideration of the arguments made by the parties at that hearing and in their various briefs relating to the matter, the Court concludes that the ruling in *Illinois Brick* is applicable to this litigation. In view of the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation*, M.D.L. 248 (N.D. Tex., Dec. 9, 1977), where the *Illinois Brick* rule was applied in an antitrust case involving plaintiffs who were indirect sellers, the Court determines that the ruling in *Illinois Brick* bars recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser.

Accordingly, in light of *Illinios Brick*, the Court must dismiss from the classes certified in these actions those class members who did not sell wheat directly to any of the defendant grain companies during the time period involved herein.

With regard to the recertification of the classes, Continental Grain contends that the remaining classes consisting of farmers who were direct sellers to a defendant grain company should not be recertified as they no longer meet the adequacy of representation or numerosity prerequisites for maintenance of a class action pursuant to Rule 23(a), Federal Rules of Civil Procedure. It maintains that the Cleveland case should be dismissed because of the lack of a class representative, as Cleveland is not a direct seller

and no class member who was a direct seller has stepped forward as a proposed class representative in that case, and that the Zinser and Spearman cases should not be recertified as neither Zinser nor Spearman were direct sellers and that the proposed new class representatives in those cases are inadequate as they have not demonstrated that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interest. Continental Grain further contends that the remaining potential classes should not be recertified as the number of direct sellers in these cases is not so large as to meet the numerosity requirement of Rule 23(a)(1), Federal Rules of Civil Procedure.

As the Court has concluded that those members of the classes involved in this action who did not sell their wheat directly to the defendant grain companies are to be excluded from the classes herein pursuant to the ruling in *Illinois Brick*, this will leave all three cases involved herein without a class representative. The information provided by Continental Grain indicates that during the time period in question it purchased wheat directly from 62 class members in the Spearman case, not more than 212 class members in the Zinser case, and not more than 92 members of the class in the Cleveland case. There is no indication in the record as to the number of class members in the Cleveland case who sold their wheat directly to a defendant grain company other than Continental Grain.

In view of the effect of the ruling in *Illinois Brick* upon the size of the classes involved in this litigation, the Court has reevaluated the propriety of giving this litigation class action treatment.

As one of the prerequisites for maintaining a class action, subdivision (1) of Rule 23(a), Federal Rules of Civil Procedure, permits a class action only when "the class is so numerous that joinder of all members is impracticable." Although the number of class members is relevant, the

language of the rule as construed emphasizes that this criterion is not a "numerousness test," but rather a determination of impracticability of joinder. 4 Newberg *Class Actions* § 7512, at 9 (1977). The determination of practicability depends on all the circumstances surrounding the case, *Rex* v. *Owens ex rel. State of Oklahoma*, 585 F.2d 432, 436 (Tenth Cir. 1978), including the magnitude of claims and the degree of dispersion of the prospective plaintiffs. *Harriss* v. *Pan American World Airways, Inc.*, 74 F.R.D. 24, 45 (N.D. Cal. 1977).

In the present status of the case, the Court in its discretion finds that the cases involved in this litigation should not be maintained as class actions as it has not been sufficiently shown to the Court that the joinder or intervention of all who might be expected to join will be impracticable. Upon consideration of the limited geographic areas involved in each case, the short duration of the alleged conspiracy, the identity of the persons allegedly coerced, the level of distribution affected by the alleged conspiracy, and the product involved, the Court concludes that the cases involved herein are no longer in such a posture as to warrant class action treatment.

The number of potential class members in each of the three cases is not so numerous as to make joinder impracticable or to make a class action any more likely to promote uniformity of decision than joinder. *See, e.g., Barcelo* v. *Brown*, 78 F.R.D. 531, 535 (D. P.R. 1978) (class action certification unnecessary where there were approximately 150 potential class members); *Aiello* v. *City of Wilmington, Del.*, 426 F.Supp. 1272, 1282-83 (D. Del. 1976) (250 potential class members are not so numerous as to make joinder impracticable); *United Steelworkers of America, Local 8024* v. *Jarl Extrusions, Inc.*, 405 F.Supp. 302, 303 (E.D. Tenn. 1975), *aff'd*, 527 F.2d 648 (Sixth Cir. 1975) (joinder of 85 potential class members practicable); *Van Allen* v. *Circle K Corp.*, 58 F.R.D. 562, 564 (C.D. Cal. 1972) (149

potential class members would not create an unmanageable piece of litigation); *Minersville Coal Co.* v. *Anthracite Export Ass'n*, 55 F.R.D. 426, 428 (M.D. Pa. 1971) (330 potential class members are not so numerous as to make joinder impracticable); *City & County of Denver* v. *American Oil Co.*, 53 F. R. D. 620, 626 (D. Colo. 1971) (joinder of 126 potential class members practicable. *Utah* v. *American Pipe & Construction Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969) (joinder of 350 plaintiffs practicable); *Bennett* v. *United States*, 266 F.Supp. 627, 629 (W.D. Okla. 1965) (potential claims of all resident and property owners in Oklahoma City not so numerous as to require a class action).

In addition, the geographic distribution of the direct sellers involved in each case, in that all such farmers in each case reside in the same general geographic area, is a factor weighing in favor of the practicability of joinder. *See DeMarco* v. *Edens*, 390 F.2d 836, 845 (Second Cir. 1968); *Ewh* v. *Monarch Wine Co.*, 73 F.R.D. 131, 133 (E.D. N.Y. 1977); *Carr* v. *New York Stock Exchange, Inc.*, 414 F.Supp. 1292, 1304 (N.D. Cal. 1976).

In view of the foregoing, the Court is unable to conclude that class actions in the cases involved in this litigation, in their present posture, would achieve economies of time, effort and expenses or promote any more uniformity of decision than the use of joinder and intervention. *See* Notes of the Advisory Committee, 39 F.R.D. 73, 102-103 (1966).

Accordingly, Zinser and Spearman's Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order is overruled in all aspects. And as the present Plaintiffs are barred from recovering herein by *Illinois Brick*, this

action, to include all cases therein, is hereby dismissed without prejudice.[4]

It is so ordered this 25th day of June, 1979.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

JUDGMENT ENTERED ON JUNE 25, 1979

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[4] Though the Court cannot make a ruling on the same, it would appear that the antitrust statute of limitations was tolled for the benefit of the class members during the period that the class actions involved in this litigation were certified. *See generally, Flanagan v. McDonnell Douglas Corp.*, 428 F.Supp. 770, 775 (C.D. Cal. 1977); 1 Newberg *Class Actions* § 1010.1o (1977).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
IN RE: WHEAT FARMERS ANTITRUST

CLASS ACTION LITIGATION

ORDER

(Filed November 13, 1979)

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the announcement of the Soviet purchase was made. In their pleadings, the Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for losses they allegedly sustained when they sold their wheat on the open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 relating to multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the

wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred for pretrial proceedings to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Speaman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case the grain companies Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company and Bunge Corporation.

On June 20, 1975, the Court certified the cases involved to be maintained as class action on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

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[1] As indicated in the Court's order filed on June 30, 1975, the classes involved are as follows:

Cleveland—"All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser—"All wheat farmers in 34 designated counties in

On June 25, 1979, the Court entered an Order wherein it found that *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed2d 707 (1977), was applicable to the instant action, and that the ruling in *Illinois Brick* thus barred recovery under Section 4 of the Clayton Act by the members in the classes in this action who did not sell their wheat directly to any of the defendant grain companies during the pertinent time period. In addition, in view of the effect of the application of the *Illinois Brick* ruling upon the size of the classes involved in this litigation, the Court reconsidered the certification of those classes involved in this litigation, the Court reconsidered the certification of those classes and concluded that the cases involved in this action should not be maintained as class actions as it had not been sufficiently shown that the classes involved were so numerous that joinder of all members was impracticable. On this basis, the Court dismissed this action without prejudice.

The action is now before the Court on various motions by the parties. The Court rules on these motions as follows:

Plaintiffs' Motions

All Plaintiffs have filed multiple motions [2] wherein they seek to have the Court set aside or amend its Order of June

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Texas located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman—"All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

[2] Plaintiff Cleveland has filed a Motion for New Trial, Motion to Vacate Judgment or Amend Judgment, Motion to Amend and a Motion for Oral Argument. Plaintiffs Zinser and Spearman have

25, 1979. The Defendants have responded to these motions and the parties have filed briefs, affidavits and letters in support of their respective contentions.

In their motions, Plaintiffs first move the Court to set aside its Order of June 26, 1979, on the ground that said Order was contrary to the law as the application of *Illinois Brick* to this case was improper. They contend that *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (Third Cir. 1979), and *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (Fifth Cir. 1979), establish that *Illinois Brick* does not apply in this case.

The Defendants contend that the Plaintiffs' instant motion should be denied as the Court has already thoroughly considered the application of *Illinois Brick* to this case.

Upon examination of the Plaintiffs' motions and briefs, and the aforementioned decisions, the Court is not persuaded to alter its decision that the ruling in *Illinois Brick* is applicable to this case.

As noted by the Defendants in their response to Plaintiffs' present motions, the Third Circuit decision in *Mid-West Paper Products Co. v. Continental Group, Inc., supra,* was brought to this Court's attention prior to the Court's Order of June 25, 1979. Upon its initial examination of the *Mid-West Paper Products Co.* decision, the Court concluded that it did not support the Plaintiffs' argument that *Illinois Brick was* inapplicable to this case. A further examination of that case has not persuaded the Court otherwise.

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filed Plaintiffs' Motion Under Rule 59(e) of the Federal Rules of Civil Procedure to Alter or Amend the Court's Order of June 25, 1979 and Plaintiffs' Supplemental Motion Under Rule 59 of the Federal Rules of Civil Procedure for New Trial and To Alter or Amend the Court's Order of June 25, 1979. All of the Plaintiffs indicate that they adopt all of the motions filed by the other Plaintiffs. In view of this, the Court will treat each motion as having been made by all Plaintiffs.

Nor does the Fifth Court's decision in *In re Beef Industry Antitrust Litigation, supra,* control this case. In its June 25, 1979, Order, this Court referred to the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation,* M.D.L. 248 (N.D. Tex., Dec. 9, 1977), as supporting the Court's determination that the ruling in *Illinois Brick* barred recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser. Although the district court's order dismissing the actions in the *In re Beef Industry Antitrust Litigation* was reversed by the Fifth Circuit on the basis that the plaintiffs' complaints therein stated claims for damages within the "cost-plus" exception to the *Illinois Brick* ruling, the Fifth Circuit agreed with the district court that *Illinois Brick* applies to price-fixing suits brought by sellers against indirect purchasers. *See* 600 F.2d at 1158-59. The Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation* that that action comes within an exception to *Illinois Brick* does not govern this case as, unlike *In re Beef Industry Antitrust Litigation,* the Plaintiffs' pleadings in this action do not allege facts that can bring this case within the "cost-plus" exception to the *Illinois Brick* rule. When the Plaintiffs raised this argument prior to the Court's Order of June 25, 1979, the Court permitted the Plaintiffs to attempt to establish the existence of any "cost-plus" contracts. Plaintiffs failed at that time to show the Court that such contracts existed in this case and have not persuaded the Court otherwise in their pending motions.

Accordingly, Plaintiffs' motions to have the Court's June 25, 1979, Order set aside on the basis that the ruling in *Illinois Brick* does not apply to this case are denied.

Plaintiffs next move the Court to permit them to amend their pleadings to name their cause of action as one for either the common law tort of fraud and deceit or statutory fraud and deceit under Oklahoma law (Plaintiff Cleveland) or civil conspiracy (Plaintiffs Zinser and Spearman).

They assert that they have pleaded the requisite elements for those causes of action, and that this Court has authority at this time to permit Plaintiffs to amend their pleadings as requested pursuant to Rule 15(a), Federal Rules of Civil Procedure. They further contend that the Defendants herein cannot be prejudiced by the Court's permitting the Plaintiffs to amend as the transactions alleged in their pleadings as giving rise to their allegations of antitrust violations are the identical transactions and facts giving rise to their actions for fraud and deceit or civil conspiracy; that there has been no bad faith or unreasonable delay in their request to amend as they were not appraised of the remedy in question until only a few days before the Court's Order of June 25, 1979; and that under the facts pleaded by the Plaintiffs, the Court itself should have recognized that if the Plaintiffs were not entitled to the antitrust damages sought, they were entitled to some relief.

The Defendants urge the Court to overrule Plaintiffs' instant motions on the basis that the proposed amendments raise substantial new issues of law, fact and jurisdiction which were never previously part of this case and which would generate new motions, require new discovery, and set this case back to its beginnings. Defendants assert that the cases in this action have been antitrust cases since their inception, in that the Plaintiffs' pleadings invoked only the antitrust laws, the class discovery involved only antitrust issues, the classes were certified on the basis of the antitrust laws, and that all discovery, motions and arguments involved only the antitrust laws; that the proposed amendments would require starting from scratch and would involve new motions to the Plaintiffs' pleadings, as amended, and the reexamination of the class issues; that the requested amendment would severely prejudice the Defendants, who have been put to the heavy burden and expense of litigating this action once and should not be forced to do so again; and that the proposed amendments will be futile as Zinser and Spearman's amendment does not state

a claim upon which relief can be granted. Defendants further contend that the Plaintiffs should be denied leave to amend as this action has been fully litigated for seven years; final judgment has been entered; the facts underlying the Plaintiffs' new claims were known to the Plaintiffs at the outset of the action; the law allegedly underlying those claims has existed since the outset of the action; Plaintiffs have shown no basis for the lengthy delay between the commencement of this action and Plaintiffs' proposed amendment; and Plaintiffs have not met their heavy burden to justify the delay.

The Court finds that the Plaintiffs' motions to amend should be denied. In this litigation, judgment in favor of the Defendants was entered on June 25, 7979. Under these circumstances, an amendment to the Plaintiffs' pleadings cannot be allowed until the June 25, 1979 judgment is set aside or vacated under Rules 59 or 60, Federal Rules of Civil Procedure. 6 Wright & Miller, *Federal Practice and Procedure:* Civil § 1489, at 445 (1971), and the cases cited therein. Wright & Miller sets out the rationale for this rule as follows:

> Although Rule 15(a) vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires," there is a question concerning the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion is made after that ten day period has expired, it must be made under the provision in Rule 60 (b) for relief from a judgment or order. This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed

> in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. Furthermore, the draftsmen of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless. (Footnotes omitted.)

As the Court has already indicated in this Order, the Plaintiffs have not shown the Court that the judgment entered herein on June 25, 1979 should be vacated or set aside. The Court is thus without authority at this time to allow the Plaintiffs to amend their pleadings to change the theory on which their actions are based.

Moreover, even if the Plaintiffs' motions to amend could be considered at this stage of the litigation, the same should be denied. Where almost seven years have elapsed since the commencement of the cases involved in this litigation, and the proposed amendments would change substantially the gist of the proceedings, the Court finds that justice would not be promoted by the proposed amendments. *See, e.g., Doe v. McMillan,* 566 F.2d 713, 720 (D.C.Cir. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed2d 59 (1978). As the *Illinois Brick* ruling was issued in June, 1977, and the Court did not enter its Order dismissing this action until June, 1979, the Plaintiffs had more than a reasonable opportunity since the *Illinois Brick* ruling to amend their pleadings. While Rule 15(a), Federal Rules of Civil Procedure, requires that leave to amend is to be freely granted "when justice so requires," the United States Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case, the Plaintiffs' motions indicate that the proposed amendments are not

based on facts and evidence unearthed during the discovery process but that the same were known to the Plaintiffs at the time their cases were commenced. Since the commencement of the cases involved herein in 1972 and 1973,[3] the Plaintiffs have proceeded in this litigation solely on the theory that the Defendants have violated the antitrust laws, and the parties have completed discovery solely focusing on the alleged antitrust violations. The Plaintiffs offer no credible explanation for their failure to move for leave to amend their pleadings until almost seven years have passed since the commencement of this litigation and over two years after the *Illinois Brick* decision and nearly 18 months after the Defendants moved for dismissal on the basis of *Illinois Brick*. Absent any explanation for such an undue delay, and in view of the prejudice to Defendants that the Plaintiffs' delay in seeking the requested amendments would cause, the Court finds that the interests of fairness and justice to both parties are best served at this stage of the litigation by avoiding the additional discovery and trial preparation which the Plaintiffs' proposed amendments would require. The additional theories which the Plaintiffs seek to include by their amendments do not represent new areas of the law that could not have been developed further and incorporated into this litigation at an earlier date. While leave to amend is to be given freely, this does not mean that it can go on indefinitely. *DeBry v. Transamerica Corp.*, 601 F.2d 480, 492 (Tenth Cir. 1979).

Accordingly, Plaintiffs' motions to amend are denied. *See generally, In re Beef Industry Antitrust Litigation, supra,* 600 F.2d at 1161-1163.

Pursuant to Rule 59(e), Federal Rules of Civil Procedure, Plaintiffs next move the Court to alter or amend

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[3] Plaintiff Cleveland's Complaint in Case No. CIV-72-731-D was filed on October 24, 1972. Plaintiff Zinser's original Complaint in Case No. CIV-73-779-D was filed on November 16, 1972. Plaintiff Spearman's original Complaint in Case No. CIV-73-780-D was filed on January 2, 1973.

its Order of June 25, 1979, and permit them to show their costs and reasonable attorneys' fees, which Plaintiffs contend they should be permitted to recover "in right, justice and equity." In this connection, Plaintiffs submit that

> *Illinois Brick* was not the law when these cases were filed and that plaintiffs have been successful in establishing a class which has been found and determined by this Court to exist, and plaintiffs have taken depositions and made discovery which have been filed with this Court which shows the liability of the defendant and certainly makes a jury question. The Court certified that cases involved to be maintained as a class action on June 30, 1975, after class discovery, and prior to the *Illinois Brick* case in 1977, plaintiffs had made complete discovery and stood ready for trial, and except for *Illinois Brick* and the Court's consideration thereof, the causes could have or would have proceeded to trial before this date, and in right, justice and equity, plaintiffs are entitled to their costs and reasonable attorneys' fees.

Defendants respond that there is no basis for an award of fees to the Plaintiffs' counsel.

The Court agrees with the Defendants. Under the American Rule, attorney fees are not ordinarily recoverable in the absence of a statute or an enforceable contract. *E.g., Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 415, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In their motions, the Plaintiffs have not cited any statutory authority for them to be awarded their attorney fees under the circumstances of this action. Although Section 4 * of the Clayton Act indicates that "the

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* The full text of this section, 15 U.S.C. § 15, is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may

cost of suit, including a reasonable attorney's fee" can be awarded in an antitrust suit, an award of attorneys' fees under this section can be made only as incident to the successful prosecution of a law action for recovery of damages based on a violation of the antitrust laws. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 459 (Second Cir. 1974); *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (Third Cir. 1967); *see* Annot., Allowance of Attorneys' Fees Under § 4 of Clayton Act (15 USCS § 15), Authorizing Award of "Reasonable Attorney's Fee" as Part of Costs Recoverable in Private Antitrust Treble-damage Suit, 21 A.L.R.Fed. 750 (1974), and the cases cited therein in §§ 5 and 6. In view of the Court's Order of June 25, 1979, the Plaintiffs have not been successful in this action and thus are not entitled to recover attorneys' fees under Section 4 of the Clayton Act.

The Plaintiffs have not established any enforceable contract whereby they are entitled to recover their attorney fees.

Nor have they shown that they come within any of the exceptions to the American Rule. Although Rule 23, Federal Rules of Civil Procedure, does not make any reference to the power of the Court to award attorney's fees in a class action and the usual rule is that they are not taxable costs, the Court has discretion to order appropriate reimbursement to the successful representatives in a class suit on the basis that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts. 7A Wright & Miller, *Federal Practice and Procedure:* Civil § 1803, at 284-285 (1972). As the Plaintiffs

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sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

have been unsuccessful in this litigation, there has not been a common benefit achieved here to justify an allowance under that exception to the American Rule. *See Gottesman v. General Motors Corp., supra.*

Accordingly, Plaintiffs' motions for the Court to alter or amend its June 25, 1979, Order to allow them their costs and attorney fees are denied.

Plaintiffs Zinser and Spearman next move the Court to vacate its Order of June 25, 1979 and transfer their cases to the United States District Court for the Northern District of Texas, Amarillo Division, with the Court's advice as to the disposition to be made of the cases. Said Plaintiffs provide no authority for such a motion but assert that as these cases were originally filed in the Northern District of Texas, the law applicable to these cases on appeal is the law of the Fifth Circuit and the cases should thus be appealed to the Fifth Circuit. They assert in their supporting brief that "the court of original jurisdiction within the Fifth Circuit appellate district, where local discovery should be had, should be the court to make a final determination in this case, and that the ends of justice would be best served by the granting of this motion."

Defendants respond that the instant motion to transfer is frivolous. They contend that this action cannot be transferred to any other federal district court as final judgment has been entered and there is nothing left to transfer on the district court level. Defendants submit that what Plaintiffs Zinser and Spearman are seeking is a transfer to the Fifth Circuit for purposes of appeal, and state that such a request was rejected in *Utah v. American Pipe & Construction Co.*, 316 F.Supp. 837 (C.D.Cal. 1970).

Plaintiffs Zinser and Spearman's motion to return their cases to the Northern District of Texas for purposes of appeal is denied as only the United States Court of Appeals for the Tenth Circuit has the authority to review the decision of this Court in the instant litigation. *See Utah v.*

American Pipe & Construction Co., supra; Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 578 (1978).

Plaintiffs next move the Court to reconsider its decision in the Order of June 25, 1979, that the direct sellers in this action do not themselves constitute a sufficient class. They request a hearing wherein they would be permitted to show the Court that a class should be established comprised of the direct sellers to the Defendants. They state that motions were filed in the *Cleveland* (should be *Zinser*) and *Spearman* cases in the federal district court for the Northern District of Texas to consolidate both cases for trial; that these motions are still pending in that court; and that if this Court does not find it proper to permit the Plaintiffs herein to introduce evidence concerning the establishment of a class, it should at lease revise its Order of June 25, 1979, and "transfer that portion of the original case which involves the direct sellers to Continental back to the court where both cases were originally filed and permit the court for the Northern District of Texas to pass upon this phase of the case."

Defendants contend that the Plaintiffs' effort to reargue the numerosity issue should be rejected as the Plaintiffs have cited no authority for such a reconsideration.

Plaintiffs' motions for the Court to reconsider its decision that the cases involved herein should not be maintained as class actions should be denied. After a hearing on the matter, the Court fully considered the propriety of giving this litigation class action treatment, and in its Order of June 25, 1979, determined that it has not been sufficiently shown that the joinder or intervention of all of the direct sellers involved in this action would be impracticable. Plaintiffs' instant motions have not persuaded the Court that such a determination was incorrect.

Accordingly, Plaintiffs' motions for the Court to reconsider its decision that the direct sellers in this action are

not sufficient to constitute a class are denied. Plaintiffs' motions are also denied to the extent they request a hearing on this matter and the transfer of their cases to the Northern District of Texas.

Plaintiffs next move the Court to reconsider its Order of June 25, 1979, and to alter or amend such Order on the basis that, as argued by Plaintiffs' Zinser and Spearman, "[t]he affidavits of independent grain dealers selling farmers' grain to Continental Grain Company, on file in this proceeding, show that such independent grain dealers were controlled in prices by Continental Grain Company, and being controlled by Continental Grain Company and the prices it fixed for grain sold to Continental is an outright exception to *Illinois Brick*.

Defendants respond that the Court has already considered this issue and that there is no need for it to now reconsider the matter.

Plaintiffs' instant motions should be denied. The Court has already fully considered whether this litigation comes within the narrow exceptions set forth in *Illinois Brick* and, in its Order of June 25, 1979, has concluded that this action does not fall within such exceptions. Plaintiffs' instant motions do not persuade the Court that such a determination was erroneous.

Accordingly, Plaintiffs' motions for the Court to reconsider its June 25, 1979, Order with regard to the application to this case of the exception mentioned in *Illinois Brick* "where the direct purchaser is owned or controlled by its customer," *see* 431 U.S. at 736 n. 16, are denied.

Plaintiffs further move the Court pursuant to Rule 59, Federal Rules of Civil Procedure, to withdraw its June 25, 1979 Order "in order to consider the matter of permitting plaintiffs and plaintiffs' attorneys to communicate with the plaintiffs as members of the original class, or, if it is the opinion of the Court that since the Order of June 25, 1979,

has been entered, that the named plaintiffs and plaintiffs' attorneys are not further bound by the rule concerning communication with members of the class, then that the Court so specify or advise." Plaintiffs contend that they owe a duty and obligation to the members of the class to discuss the case with them and to inform them of the Court's action, their rights as far as appeal is concerned, and the filing of independent suits, and assert that they cannot discharge this duty and obligation without them being permitted to communicate with such class members, and that any such "gag" order is an infringement upon their First Amendment rights and on undue restraint upon the rights, duties and obligations of Plaintiffs' counsel. Plaintiffs state that in imposing the protective order in this case, the Court simply maintained the local court rule of the United States District Courts of the Northern District of Texas, which local court rule the Plaintiffs state has been rescinded. Plaintiffs urge this Court "to certainly repeal the rule as it applies to the wheat cases at this time, and particularly in light of the action of the court where the cases were originally filed."

Defendants respond that the Plaintiffs' instant motion should be denied as it is untimely, in that it was not made within the 10-day time period set forth in Rule 59(e); that the Plaintiffs are apparently seeking to be released from the Court's order regulating class communications in order to solicit the representation of former class members in potential new actions and that such solicitation is expressly prohibited by the Court's order as well as by the recommendations of the Manual for Complex Litigation, and is ethically improper; that the Plaintiffs' argument that the Court's order regulating class communications should be vacated because the local court rule for the federal district courts in the Northern District of Texas has been revoked is without merit, in that the Court's order was based not on the local court rule in the Northern District of Texas but the rule and sample order contained in the Manual for

Complex Litigation; and that the Court's judgment entered herein on June 25, 1979, does not relieve the Plaintiffs or their counsel of their obligation not to engage in improper communications with former class members as said judgment does not affect counsel's basic ethical obligation not to solicit clients nor the obligations of Plaintiffs and their counsel under the Court's Order of January 4, 1974, as the potential for abuse in this litigation is still present.

As these actions have not been finally closed, as appeals are possible and seem likely, the Court is aware of no reason why the principles underlying the protective order of January 4, 1974, should not continue to be applicable to finality of this litigation.

In view of the foregoing, all of the Plaintiffs' motions are denied. As the Court is able to fully consider and rule on said motions upon the motions and Defendants' responses thereto, and the parties' briefs and letters in support thereof, the Court finds that it is not necessary for it to conduct oral arguments on said motions. Plaintiffs' Motions for Oral Argument are thus denied.

Defendants' Motion to Correct and Clarify the Court's Order and Judgment of June 25, 1979.

Pursuant to Rules 59(e) and 60(a), Federal Rules of Civil Procedure, the Defendants move the Court to correct and clarify its Order and Judgment of June 25, 1979, to provide clearly that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any Defendant during the applicable time period are dismissed with prejudice and that the claims of all members of the classes who sold wheat directly to any Defendant during the applicable time period are dismissed without prejudice.

Plaintiffs respond that the Court should not amend its Order as requested by the Defendants on the basis that it

"would be unjust and inequitable, under the facts of this case, to dismiss Plaintiffs' course of action with prejudice, as such action could deprive Plaintiffs of their rights to refile and could have the effect of failing to toll the statute of limitations." Plaintiffs contend that their pleadings in the cases involved in this litigation are broad enough to allege common law torts are well as antitrust violations, and that any dismissal of their antitrust actions should be without prejudice to their right to amend their pleadings or to refile their actions so as to allege their common law torts.

Upon consideration of the Defendants' Motion to Correct and Clarify the Court's Order and Judgment of June 25, 1979, the Court finds that said Motion should be granted. Accordingly, the Court's Order and Judgment entered herein on June 25, 1979, should be amended to show that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any of the Defendants during the applicable period of time are dismissed with prejudice, and the claims of all members of the classes who did sell wheat directly to any of the Defendants during the applicable period are dismissed without prejudice.

It is so ordered this 13th day of November, 1979.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
Civ. 72-731-D
Civ. 73-779-D
Civ. 73-780-D

IN RE: WHEAT FARMERS ANTITRUST
CLASS ACTION LITIGATION

AMENDMENT TO JUDGMENT

(Filed November 13, 1979)

The Court having issued its Order on June 25, 1979, and Judgment having been entered thereon on June 25, 1979, and defendants having moved by Motion, dated July 3, 1979, to amend the Judgment, the Court finds that said Motion should be granted.

It is therefore Ordered that the Judgment entered herein on June 25, 1979, is amended as follows:

1. The claims of all members of the classes, conditionally certified pursuant to order dated June 30, 1975, in each of the five consolidated cases herein, who did not sell wheat directly to any of the defendants during the applicable period are dismissed with prejudice; and

2. The claims of all members of the classes who did sell wheat directly to any of the defendants during the applicable period are dismissed without prejudice.

Dated this 13th day of November, 1979.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 13, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129
IN RE: WHEAT FARMERS ANTI-TRUST
CLASS ACTION LITIGATION
CIV-73-779-D

JOE ZINSER, Individually and on behalf of each and all other persons similarly situated who were wheat farmers and sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following counties of the State of Texas: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Oldham, Potter, Carson, Gray, Deaf Smith, Randall, Armstrong, Parmer, Castro, Swisher, Hale, Briscoe, Floyd, Childress, Hardeman, Foard, Wilbarger, Wichita, Knox, Baylor, Archer, Haskell, Throckmorton, Young, and Clay, *Plaintiffs*,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Defendants.

N. D. Texas, Civil Action No. 2-1309, AMENDED

COMPLAINT

(Filed August 15, 1974)

Now COMES the Plaintiff and alleges upon information and belief that:

1. This Complaint is filed and this action is instituted against the Defendants under authority of Sections 4 and 12 of the Clayton Act (15 U.S.C.A. §§ 15 and 22) in order to recover treble damages for injuries received by Plaintiff in his business or property as a consequence of Defendants' violation of the antitrust laws, as hereinafter alleged, spe-

cifically, Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

2. Under authority of Rule 23, this action is brought as a class action on behalf of the named Plaintiff, as well as on behalf of each and all other persons similarly situated who are wheat farmers and sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following counties of the State of Texas, to-wit: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Oldham, Potter, Carson, Gray, Deaf Smith, Randall, Armstrong, Parmer, Castro, Swisher, Hale, Briscoe, Floyd, Childress, Foard, Hardeman, Wilbarger, Wichita, Knox, Baylor, Archer, Haskell, Throckmorton, Young and Clay.

3. The class of Plaintiffs consists of approximately 12,000 wheat farmers who sold wheat between May 1, 1972, and September 1, 1972, in the area included within the class; therefore, the number constituting the class is so numerous as to make it impracticable to bring them all before this Court.

4. The right which is the subject of this action is common to all of the above identified wheat farmers, and there are questions of law and fact that are common to each member of the class. Claims of the named Plaintiff are typical of the claims of other members of the class; and the Plaintiff will fairly and adequately protect the interest of each as required by Federal Rule 23.

5. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudication which would establish incompatible standards of conduct for the Defendants. Further, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication

of the controversy. Through the class action, the Defendents will not be required to defend a multiplicity of suits that might be filed over a long period of time. There will likewise be no difficulties likely to be encountered in the management of the class action. Members of the class can easily be identified and notified that this action has been filed.

The Parties

6. The named Plaintiff is a citizen of the State of Texas and operates a wheat farm in Deaf Smith County, Texas.

7. Clarence Palmby, an individual, resides at 45 Sutton Place, New York, New York, and is the Vice President of the Defendant, Continental Grain Company. He is the former Assistant Secretary of the United States Department of Agriculture.

8. Continental Grain Company, a Delaware corporation with its principal place of business in New York, conducts business within the Northern District of Texas. It has an agent and representative in Hereford, Deaf Smith County, Texas.

9. Each of the above named Defendants were and are interested in wheat trading, buying and selling in interstate and foreign commerce and Continental Grain Company is engaged in interstate and foreign commerce, specifically in the business of exporting grain, including wheat, from the United States into the world market. A substantial share of this grain comes from the fields of Texas located within the jurisdiction of this Court.

Statement of Facts

10. In 1969, there was a total seeded area in wheat in the United States of about 54,312,000 acres. The geographical center of the wheat acreage in the United States falls on the Kansas-Nebraska line, near the Colorado boundary.

11. There are about 42 states in which wheat of several varieties is grown. Of the total 54,312,000 seeded acres in 1969, hard red winter wheat accounted for 32,309,000 acres. Of the 32,309,000 seeded acres of hard red winter wheat in 1969, 5,299,000 acres were located in the State of Oklahoma; about 3,500,000 acres were located in Texas; about 3,000,000 acres were located in Nebraska; about 10,000,000 acres were located in Kansas; and about 3,000,000 acres were located in Colorado.

12. Hard red winter wheat is harvested at different times. Harvesting starts at the southern edge of the hard winter wheat belt in Texas and moves north through Oklahoma, Kansas, Nebraska and Colorado. In the State of Texas, 1962, through 1966, crop average production of wheat was 60,621,000 bushels. In 1968, the production of wheat in Texas was 84,150,000 bushels. Parmer County produced 3,724,000 bushels of wheat in 1968. Deaf Smith County produced 5,060,000 bushels of wheat in 1968. A large portion of the wheat produced in Texas is on irrigated lands in the Panhandle and in the Northern District of Texas. Texas produced about 84,000,000 busheis of wheat in 1972.

13. Harvest time for the 1972 Texas wheat crop in the area included in this Complaint was in the months of May, June and July. In such 34 Texas counties, approximately 34,008,400 bushels of hard red winter wheat was harvested from approximately 1,492,200 acres of land. Approximately 24,629,423 bushels were sold within the 34 county area during the months of May, June, July and August of 1972.

14. There is a number of ways for a farmer to handle his wheat crop. He can store it in his own silo or elevator; he can place the grain with a co-op elevator; he can contract or sell to a privtae elevator; he can sell on the Board of Trade; or he can participate in the United States Government loan program. Under the latter program, the farmer can take $1.25 per bushel from the Government as a loan and take one year to sell on the open market.

15. The named Plaintiff, JOE ZINSER, of Hereford, Texas, operates an irrigated farm in Deaf Smith County, Texas. He harvested approximately 150 acres of wheat in the latter part of May and in June of 1972, from his irrigated wheat crop grown in Deaf Smith County, Texas. This wheat crop yielded about 50 bushels per acre, or approximately 7,500 bushels. Plaintiff sold his wheat, which is called winter wheat, and which had been planted in the Fall of 1971, soon after it was harvested in the latter part of July, 1972, for $1.43 per bushel and for a total of $10,720.00. If Plaintiff had known that the international sales were being negotiated by Continental Grain Company and by Clarence Palmby, or that a sale to Russia was to be made, he would have known that the price would have increased and he would not have sold his wheat at that time, but would have held it. Plaintiff could have placed said wheat in the commodity loan if he had been aware of what was taking place. If Plaintiff had held his wheat, he could have received at least 50 cents per bushel more for his wheat than he did receive, and this would have increased his income by $3,750.00 from his wheat yield on his wheat crop which he harvested and sold in the year 1972. Plaintiff has been and was damaged in this respect, as were all other wheat farmers who did not hold their wheat, but who sold it at harvest time, and the majority of farmers did sell their wheat when it was harvested and were damaged in the same way. Plaintiff received no word from the U.S.D.A. concerning negotiations with, treaties with, or sales to Russia. Plaintiff does his work on the farm and is not knowledgeable in foreign affairs and international relationships and trades with foreign governments.

16. Following the harvest of hard red winter wheat, farmers at the southern end of the belt, Texas and Oklahoma, sold their wheat for $1.25 to $1.32 per bushel. Based on the demand increase created by the grain needs of the Soviet Union, the prices received by Texas farmers for their wheat were substantially less than what the market price would

have been except for the price-fixing conspiracy of the Defendants.

Wheat Sale to Russia

17. The 1972 Russian wheat crop was a major failure. A severe winter with limited snow cover led to heavy winterkill of Fall-planted grains in Russia. To compensate for this loss, the Soviets increased the planting of Spring grains; however, these Spring-planted grains ran into a hot, dry Summer.

18. Approximately 419,000,000 bushels of wheat, about 20 per cent of the total 1972 American crop, had been purchased by the Soviets by early September, 1972. This massive increase in demand caused prices to increase from $1.30 or less per bushel in July, to a price of $2.50 or more per bushel in September.

19. Had the Texas farmers been made aware of the Russian wheat disaster, the would have held their grain in storage until the market forces of competition had adjusted the wheat prices upward. There are adequate storage facilities in the State of Texas.

20. The United States Department of Agriculture had knowledge of the Russian wheat disaster prior to the time that Texas farmers harvested and sold their wheat. This information was given to Continental Grain Company and was withheld from the farmers.

21. The Defendants, with prior knowledge of the Russian grain situation, violated the antitrust laws by conspiring to withhold market information that would have, if released, inflated the market price for wheat. This price-fixing conspiracy is illegal per se under Section 1 of the Sherman Act.

Facts Showing Conspiracy

22. Continental Grain Company is the largest grain dealer in the United States, and handles a majority of the

grain grown in Texas, both for domestic use and export, and Continental Grain Company has for many years enjoyed a dominating position in the market place for wheat grain, both for domestic use and for export to other countries. Continental Grain Company has offices, employees and facilities throughout the world, in practically all nations in the world, using and consuming wheat, and has at all times referred to herein, maintained a close relationship to key employees in the United States Department of Agriculture charged with the responsibility of determining and knowing the world wheat situation, including Defendant Palmby, and this close relationship existed throughout the years 1971 and 1972. The Defendant, Continental Grain Company, used its said close relationship with the United States Department of Agriculture and Palmby as an individual to suppress information concerning the above-described international wheat shortage existing in Russia and China and the necessity of both Russia's and China's having to obtain wheat as a food for their people from the United States, and that other wheat producing countries would not be able to supply such grain because of the drought condition and short supply existing in many areas of the world, including Russia and China. These facts, as well as the pending massive wheat sale to Russia and other large international grain transactions, were suppressed and kept secret as a part of the conspiracy in order that Continental Grain Company could use its dominating position in the market place to assure that Continental Grain Company and a few other grain companies selected by Continental Grain Company, were able to make all the profit on these huge and massive export deals, and at the same time, maintain the domestic price of grain at a lower level in order that Continental Grain Company might buy grain from producers such as Plaintiffs at a lower price. In order that Continental Grain Company could handle the deal without publicly disseminating information, Continental Grain Company took into its confidence other large

grain dealers, hereafter mentioned and listed. These other grain dealers hereafter mentioned who were taken into the confidence of Continental grain Company, and Clarence Palmby, were allowed to participate in the exports in order that the need could be filled without public dissemination of information, and Continental Grain Company received certain concessions and benefits from them at the same time Clarence Palmby, in turn, received certain benefits from Continental Grain Company.

23. The Defendant Continental Grain Company and those working with said Defendant export approximately 90 per cent of the total grain exported from the United States. A close relationship has been maintained between the big six grain dealers and the Department of Agriculture, with Continental Grain Company's taking the initiative. With this closeness and by working together, the Defendants were able to keep the market price suppressed until they had acquired a substantial amount of grain destined to be sold to Russia.

24. A marketing team from the Department of Agriculture, led by Secretary Earl L. Butz, first went to Russia in April, 1972, to negotiate terms of trade for the possible sale of grain to the Soviet Union. This meeting was a follow-up to the grain sale that had been made in the Fall of 1971, and it followed an expression of interest in further trade made by Soviet Minister of Agriculture Vladimir Matskevich when he visited the United States in December of 1971.

25. Included on the marketing team that went to Russia in April, 1972, with Secretary Butz were Clarence Palmby and Clifford G. Pulvermacher. Palmby, at the time, was Assistant Secretary for International Affairs and Commodity Programs for the Department of Agriculture. Pulvermacher was, at the time of negotiations with the Soviets, the Department's General Sales Manager.

26. During harvest in 1972, Continental Grain Company was busy buying the current wheat crop cheaply and storing the bulk in their massive elevators intended for export. Continental Grain Company's grain storage capacity exceeded 150 million bushels. The other grain companies herein mentioned and their storage capacity was needed by Continental Grain Company in receiving the 1972 grain crop from the producers and farmers in preparation for the massive sales contemplated to Russia and other foreign countries.

27. In June of 1972 a Russian delegation headed by M. R. Kuzmin, Soviet First Deputy Foreign Minister of Trade, came to Washington. These sessions lasted until President Nixon announced the two-nation, three-year credit agreement on or about July 8, 1972. At the same time, officials of Exportkhleb, the Soviet state trading organization, were in Washington and met with representatives and executives from Continental Grain Company in the month of June in the Madison Hotel. Clarence Palmby and Continental Grain Company officials from the company's Paris office entertained the visiting Russians. During such time, Palmby worked with the officers of Continental Grain Company and the Russian officials. The meeting between Continental Grain Company and the Russians was continued from Washington to New York, and on or about July 3, 1972, the Russians bought an estimated 147 million bushels of wheat from Continental Grain Company, which was consummated only a few hours or days before the United States-Russia agreement was signed and announced.

28. The United States agriculture attache in Moscow had been permitted by the Soviets to make a rare visit to the remote regions of Russian wheat lands in August of 1972. Reports concerning the seriousness of the Russian wheat loss were issued by the attache in June and August. By mid-August, the report concluded that the Russian grain production had worsened from earlier estimates. This re-

port, however, was never released because the Department of Agriculture deemed the findings too controversial. The market analysis was thus classified as confidential. These reports were accessible to certain ranking members of the Department and the information was released to the Defendant grain company.

29. Clarence Palmby, who as Assistant Secretary for International Affairs and Commodity Programs went to Russia to negotiate terms of trade for a possible sale of wheat in April of 1972, knew at the time that he was leaving the Department to become vice president of the Defendant, Continental Grain Company. Just before leaving for Russia, Palmby, on April 3 or 4, 1972, purchased a luxury cooperative apartment at 45 Sutton Place, New York, New York, valued from $90,000.00 to more than $100,000.00. The monthly maintenance cost for the apartment would run about $500.00 per month.

30. Palmby, described by Secretary Butz as being a man of modest means, made a large down payment on the apartment. In his application for credit, Palmby listed the four top officers of Continental Grain Company as credit references. Continental Grain Company's world headquarters are located in New York. Before acquiring this apartment, Palmby earned $38,000.00 a year at the Department of Agriculture.

31. Three days after signing the apartment purchase contract, Palmby was in Moscow as Assistant Secretary of Agriculture, negotiating the initial grain deal with Russia. On May 9, 1972, Palmby met with a high Soviet trade official in Washington to further discuss the grain deal. On May 12, 1972, Palmby informed Secretary Butz that he had received a firm offer of employment from Continental Grain Company, which offer he had decided to accept. Palmby resigned from the Department of Agriculture on June 7, 1972, and on June 8, 1972, he became vice president of Continental Grain Company.

32. The reported salary of Palmby with Continental Grain Company is $100,000.00 per year, plus expenses and other employment benefits, on a ten-year employment basis.

33. From March or early April of 1972 until June 7, 1972, Palmby held an employment contract with Continental Grain Company while at the same time serving as Assistant Secretary of Agriculture and leading the Government's negotiating team that eventually worked out the terms of the sale of wheat to Russia.

34. After leaving the Department of Agriculture, Palmby, as vice president of Continental Grain Company, on July 2, 1972, met with two members of the Russian team that had arrived to negotiate wheat purchases with Continental Grain Company. Present at this meeting was a Mr. Ziv from the Paris offices of Continental Grain Company. Three days after this meeting, July 5, 1972, Continental Grain Company concluded a 150 million bushel wheat sale to the Soviet Union.

35. Besides the negotiations with Continental Grain Company, there were two periods of negotiations on wheat sales between representatives of the Soviet Union and representatives of the Defendant grain companies. The first meeting was held from June 29 through July 21; and the second trip was from July 31 until about August 18, 1972. Soviet purchases of wheat from American companies during these two periods were as follows:

Company	*Wheat in Tons Purchased*	
	First Trip	Second Trip
Continental Grain Company	5,000,000	None
Cargill, Inc.	1,000,000	1,000,000
Louis Dreyfus Corp.	750,000	1,500,000
Cook Industries	600,000	300,000
Garnac Grain Co.	200,000	350,000
Bunge Corporation	None	600,000
Totals	7,550,000	3,750,000

36. Both of the Defendants knew of the negotiations with Russia before any harvest of hard winter wheat. The United States-Soviet credit agreement was not announced until July 8, 1972, which was three days after Continental Grain Company's first sale. The full extent of the Soviet purchases did not become apparent until after the Russians returned to Moscow about August 21, 1972.

37. It was mutually advantageous for the Defendants to suppress any information they held on the wheat transactions with Russia at least until the Defendant, Continental Grain Company, had acquired on the market sufficient amounts of wheat and wheat futures to satisfy its contractual obligations with Russia. Because of the closeness of these companies, they were able to conduct negotiations from June 29 without revealing the condition of the market to the farmers. To ensure this silence, the Defendants with a close personal relationship with the Department of Agriculture were able to suppress an official Government report completed August 18, 1972.

38. Some information concerning the Soviet buying did become known in the trade. As a result, the domestic market price for wheat rose to $1.76 per bushel by mid-July and $1.78 per bushel by the time the Russians returned to Moscow. Subsequently, when the full extent of the Soviet purchases became known, the price rose to $2.50 a bushel.

39. The close relationship of the grain companies with the Department of Agriculture is demonstrated by the flow of personnel from the Department into the companies and from the companies into the Department. Clarence Palmby had been Assistant Secretary of Agriculture until he resigned on June 7, 1972, to become vice president of Continental Grain Company. Clifford Pulvermacher, who went to Russia with Palmby in April of 1972, resigned his position with the Department as General Sales Manager on June 30, 1972, to become the Washington representative for the Bunge Corporation.

40. George Shanklin had been the Washington representative for the Bunge Corporation. He left Bunge and became employed by the Department of Agriculture, as Assistant Sales Manager in the Department of Export marketing service commodity exports, on February 14, 1974.

41. William R. Pearce left Cargill, Inc., in February, 1972, to join President Nixon's staff at the White House and the Department of Agriculture to get Cargill included in last year's feed grain sale to the Soviet Union.

Profits Made by Grain Companies

42. The Defendants made excessive profits on their sale of wheat to Russia in two ways. First, they made a profit represented by the difference between the low price paid to farmers and the higher price received in the sale to Russia. The second profit was in the form of a subsidy paid by the Government.

43. The Russians were able to buy wheat at the prevailing world price of $1.63 to $1.65 a bushel, with the Government of the United States paying the exporter a subsidy measured by the difference between the world and domestic prices. This subsidy, however, was not determined on the basis of the domestic price on the date of the sale. Instead, it was the domestic price on the day that the grain exporter registered the sale with the Department of Agriculture.

44. With knowledge that the domestic wheat prices would increase as information was released to the farmers, the grain companies sold their wheat to the Soviets and postponed filing the notification of sale. For example, the subsidy paid on July 13 was 13 cents; however, as the domestic price continued to rise, a subsidy of 36 cents was being paid on August 14.

45. The Department of Agriculture during the latter part of August decided to suspend subsidy payments on wheat exports. Wheat dealers would, following the suspen-

sion, be required to compete in the world market on their own. Because of the shortage of wheat, however, the world price became the domestic price in the United States.

46. On August 24, 1972, Charles Pence, of the Department of Agriculture, telephoned Continental Grain Company and each of the grain companies to give them a "tip off" of the impending change in the wheat subsidy program. They were told not to assume that sales made after the close of business on August 23, 1972, would necessarily qualify for export subsidy payments. The Department of Agriculture then announced that exporters would be allowed an additional five days within which they could register sales made prior to August 24 and receive subsidy payments. During this five-day period a subsidy of 47 cents a bushel was paid for hard winter wheat.

47. During these last five business days, the Continental Grain Company, the Defendant, and the other grain companies registered for subsidy payments 166 million bushels of wheat. Total subsidies paid during this period, most of them at 47 cents a bushel for wheat sold to Russia, amounted to more than 77 million dollars. The 166 million bushels of wheat registered during the special five-day period represented about 40 per cent of the total amount of wheat sold to Russia—419 million bushels. Continental Grain Company received the larger benefit.

Antitrust Violations

48. Continental Grain Company entered into an agreement or conspiracy with Clarence D. Palmby and others unknown to Plaintiff at this time in restraint of trade or commerce among the several states and with foreign nations. Through this agreement, which provided special market information to Continental Grain Company and suppressed the information from being released to the public, the domestic market price for hard winter wheat was depressed. This, being a price-fixing conspiracy, is

illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

49. The Defendants had knowledge that concerted action to suppress market information from wheat farmers in order to keep prices low was contemplated and invited. With this knowledge, the Defendants gave their adherence to the scheme and participated in it. This is a price-fixing conspiracy, illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

50. The Defendants agreed, reached some understanding or conspired among themselves to inflate the domestic market price for wheat after purchasing most of their needs for the Russian sale in order to increase their subsidy payments. This is a price-fixing conspiracy, illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

51. The Defendants conspired among themselves and with the Secretary of the Department of Agriculture, Earl L. Butz, and other employees of the Department of Agriculture to preserve low wheat prices during the period of negotiations by Continental with the Russians.

52. The Defendants, Continental Grain Company and Clarence Palmby, acted together in a common conspiracy which was intended to and did restrain trade and commerce among the several states and with foreign nations for their respective benefits to the detriment of the farmers and producers of wheat and did, by their so acting together and by their secretive dealings, as hereinabove set forth, enable Continental Grain Company to buy wheat for its own account, at and below what would have been the market value for such wheat and the price for which such wheat would have sold except for the accomplishments by their said conspiracy in keeping secret the massive sales which were known by them, but unknown to the farmers and producers of wheat grain. Such actions were predatory, anticompetitive and unfair practices made in bad faith and such con-

duct was inequitable and was in restraint of trade, and was not only an attempt to, but in fact did, monopolize the market in violation of law and was price-fixing and illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

53. The Defendant, Continental Grain Company, did attempt to monopolize and hold for itself and its friends the opportunity to sell wheat to Russia and other foreign countries at higher prices to the exclusion of other wheat dealers by maintaining a blanket of secrecy concerning the above described large foreign wheat sales, and the said Continental Grain Company did attempt to monopolize such trade in wheat with foreign nations and did monopolize such trade and did combine or conspire with Clarence Palmby, Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company and Bunge Corporation, to monopolize the above described sales of wheat to foreign countries in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C.A. § 2). The effect of such monopoly and conspiracy to monopolize and attempt to monopolize was to maintain the price of domestic wheat at a falsely low level to the injury and damage of your Plaintiffs herein, in that the other grain dealers who were not privileged to obtain and have the information which Palmby made available to Continental Grain, and Continental Grain Company made available to its friends, the other dealers in domestic wheat were unaware of the true demand for wheat and therefore, did not offer and would not pay as much to your Plaintiffs as they would have paid had Plaintiffs not been the victims of the monopoly, attempt to monopolize, and combination and conspiracy to monopolize above described.

Injury to Plaintiff Wheat Farmers

54. As a direct result of the Defendants' conspiracy to fix wheat prices, the Plaintiff wheat farmers were injured in their business or property. The Plaintiffs lost the differ-

ence between what they actually received for their wheat and what they would have received for the wheat except for the conspiracy to withhold information.

55. It is impossible to accurately assess the total damage to the Plaintiffs as a class; however, after sufficient opportunity for discovery, Plaintiffs as a class will be able to present sufficient evidence from which this Court or a jury will be able to draw a reasonable inference as to the exact amount of injury. As a reasonable estimate, with the possibility that the Plaintiff will need to amend the Complaint, damages to the class resulting from Defendants' antitrust violations was Fifty Million Dollars ($50,000,000.00).

56. The named Plaintiff lost approximately Three thousand, seven hundred fifty Dollars ($3,750.00) in lost profits as a direct result of the price-fixing conspiracy of the Defendants.

Relief Requested

WHEREFORE, Plaintiff prays:

1. That the Defendants be adjudged to have violated Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

2. That the Plaintiff be allowed to recover threefold the damages sustained by them, plus the costs of suit, including reasonable attorneys' fees as authorized by Section 4 of the Clayton Act (15 U.S.C.A. § 15).

3. That the Plaintiffs have such other and further relief as may be just and proper.

WITHERSPOON, AIKIN, LANGLEY
WOODS, KENDRICK & GULLEY
P. O. Box 1818
Hereford, Texas 79045

By: /s/ JAMES W. WITHERSPOON
Attorneys for Plaintiff

JURY DEMAND

Plaintiff respectfully demands trial by jury on each and every issue in this cause.

/s/ JAMES W. WITHERSPOON
James W. Witherspoon

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, certified mail, postage prepaid, this 14th day of August, 1974, to Mr. Neal R. Allen, Attorney at Law, P. O. Box 189, Amarillo, TX 79101, and Mr. Judson S. Woodruff, (Designated liaison counsel for all defendants in all referenced cases), 5th Floor, 100 Park Avenue, Oklahoma City, OK 73102.

/s/ JAMES W. WITHERSPOON
James W. Witherspoon

TWK/rdw

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Clovis, New Mexico 88101
1-505-762-4544
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MDL Docket No. 129
Civil Action No. CIV. 73-780 (D)
CA-2-1330 Amarillo

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Plaintiffs Hereby Demand a Jury Trial on All Issues.

JOHN SPEARMAN, individually and on behalf of each and all other persons similarly situated who were wheat producers in Curry County, State of New Mexico and sold wheat on the open market from May 1, 1972, until September 1, 1972,
Plaintiffs,

-vs-

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Defendants.

FIRST AMENDED COMPLAINT

(Filed September 3, 1974)

COMES Now the Plaintiff and alleges upon information and belief that:

Jurisdiction and Venue

1. This Complaint is filed and this action is instituted against the Defendants under authority of Sections 4 and 12 of the Clayton Act (15 U.S.C.A. §§ 15 & 22) in order to recover treble damages for injuries received by Plaintiff

in his business or property as a consequence of Defendants' violation of the antitrust laws, as hereinafter alleged, specifically, Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 & 2).

Class Action

2. Under authority of Federal Rule 23, this action is brought as a class action on behalf of each and all other persons similarly situated who are wheat producers within Curry County, State of New Mexico, whether resident or non-resident, who sold wheat produced within said county between the dates of May 1, 1972 until September 1, 1972, either by contract or by spot sale, specifically excluding commodity futures trading.

3. The class of Plaintiffs consists of approximately 1,500 wheat producers in Curry County, New Mexico; therefore, the number constituting the class is so numerous as to make it impracticable to bring them all before the Court. All farms in said County produce wheat with the exception of an insignificant few. A complete list of all 1972 crop producers in Curry County, New Mexico, with name, address, farm size and location is available and in the custody of Plaintiff. All landlords, property owners, share-croppers, tenants and persons having an interest in farm land and crops grown thereon are listed therein.

4. The right which is the subject of this action is common to all of the above identified wheat farmers, and there are questions of law and fact that are common to each member of the class. Claims of the named Plaintiff are typical of the claims of the other members of the class; and the Plaintiff will fairly and adequately protect the interest of each as required by Federal Rule 23. Records are available reflecting all sales made by the Plaintiffs within the defined class and same reflect the amount of damage incurred by each plaintiff and total damages incurred by the class. The total sum of damages incurred due to Defendants' acts herein complained of may be determined easily and accurately.

5. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudication which would establish incompatible standards of conduct for the Defendants. Further, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Through the class action, the Defendents will not be required to defend a multiplicity of suits that might be filed over a long period of time. There will likewise be no difficulties likely to be encountered in the management of the class action. Members of the class can easily be identified and notified that this action has been filed.

The Parties

6. The named Plaintiff is a citizen fo the State of New Mexico and at all times pertaining hereto operated a wheat farm in Curry County, State of New Mexico, and also operated a small farm in Parmer County, Texas. An insignificant number of the producers within the heretofore described class of Plaintiffs produce wheat in both Curry County, New Mexico, and the State of Texas or Curry County, New Mexico, and any other area of New Mexico.

7. Clarence Palmby, an individual, resides at 45 Sutton Place, New York, New York, and is the Vice President of the Defendant, Continental Grain Company. He is the former Assistant Secretary of the United States Department of Agriculture.

8. Continental Grain Company, a Delaware corporation with its principal place of business in New York, conducts business within the Northern District of Texas and the District of New Mexico. It has an agent and representative in Hereford, Deaf Smith County, Texas, for service of process named Dennis Wosnitzky. It is qualified to do business in the State of New Mexico and its registered

agent for service of process is The Corporation Company, 220 Otero Street, Santa Fe, New Mexico.

9. Each of the above named Defendants were and are interested in wheat trading, buying and selling in interstate and in foreign commerce specifically in the business of exporting grain, including wheat, from the United States into the world market. A substantial share of this grain comes from the fields of Texas located within the jurisdiction of this Court with only a portion from Curry County, New Mexico, which is well within one hundred miles of the location of this Court.

Statement of Facts

10. In 1969, there was a total seeded area in wheat in the United States of about 54,312,000 acres. The geographical center of the wheat acreage in the United States falls on the Kansas-Nebraska line near the Colorado Boundary.

11. There are about 42 states in which wheat of several varieties is grown. Of the total 54,312,000 seeded acres in 1969, hard red winter wheat accounted for 32,309,000 acres. Of the 32,309,000 seeded acres of hard red winter wheat in 1969, 5,299,000 acres were located in the State of Oklahoma; about 3,500,000 acres were located in Texas; about 3,000,000 acres were located in Nebraska; about 10,000,000 acres were located in Kansas; about 3,000,000 acres were located in Colorado and about 288,000 acres were located in New Mexico.

12. Hard red winter wheat is harvested at different times. Harvesting starts at the southern edge of the hard winter wheat belt in Texas and moves north through New Mexico, Oklahoma, Kansas, Nebraska and Colorado. In the State of New Mexico, the 1972 crop production of wheat was 4,335,000 bushels; the 1971 crop production of wheat was 3,840,000 bushels; the 1970 crop production of wheat was 5,152,000 bushels; the 1969 crop production of wheat was 4,293,000 bushels; the 1968 crop production of wheat was 3,948,000 bushels. Curry County, New Mexico produced

2,783,000 bushels of wheat in 1971 and 3,274,000 bushels in 1972. A large portion of the wheat produced in New Mexico is on irrigated lands in Curry County.

13. Harvest time for the 1972 Curry County, New Mexico, wheat crop, as always, was in the months of June and July.

14. There are a number of ways for a Curry County wheat producer to handle his wheat crop. A producer may store his commodity in a commercial or public elevator with sale thereof to or through said concern. During the period of storage, the producer may acquire funds by a non-recourse loan from the Commodity Credit Corporation. During all periods of time relevant hereto the said loan rate was $1.27 per bushel with a premium of four cents per bushel on 13 percent protein wheat for a total of $1.31 per bushel on the said loan. All commercial and public elevators handling the subject wheat during the periods relevant hereto utilized an in-house average protein ratio of 13 percent and netted the producer $1.31 per bushel on the said non-recourse loan. Said loans, whether the Curry County, New Mexico, grain was stored in Texas or New Mexico, matured on April 30, the following year and could be extended by government action. The interest rate on said loans was 3½ percent per annum with storage charges negotiable between the producer and the elevator, but not exceeding 2.1 cents per month per hundredweight. During the extended loan period, the government paid all storage charges. If the price of wheat exceeded the original loan balance plus interest and storage charges for the initial period, the producer could redeem his loan and sell the commodity thereby acquiring the difference. If the price of wheat never rose above the original loan balance plus said charges, the producer could keep the $1.31 per bushel without further obligation. Where there is no information to reflect a future increase in price, the producer usually sells his crop at harvest or soon thereafter. Conversely, when there is a possibility of a price increase, the producer

will make use of the government loan program. Producers in Curry County, New Mexico have very few on-farm grain storage facilities and do not store wheat on the farm since the government loan rate covers only 80 percent of $1.27 per bushel, weather conditions make such facilities unsuitable and most commercial and public elevators did not charge storage up to the first of the next year.

15. The named Plaintiff, John Spearman, of Clovis, New Mexico, operates an irrigated and dryland farm in Curry County, New Mexico, and also a small farm in Parmer County, Texas. He harvested 22,962 bushels of wheat in the latter part of June and July, 1972, from his irrigated farms in Curry County, New Mexico, and Parmer County, Texas, with a total of 2,045 bushels thereof having to be harvested from his farm in Parmer County, Texas, and 20,917 bushels from his farm in Curry County, New Mexico. Plaintiff sold his wheat, which is called hard red winter wheat, which had been produced in Curry County, New Mexico, and which had been planted in the fall of 1971, soon after it was harvested on July 5, 1972, for $1.35 per bushel for a total of $28,237.95. If Plaintiff had known that the international sales were being negotiated by Continental Grain Company and by Clarence Palmby or that a sale to Russia was to be made, he would have known that the price would have increased and he would not have sold his wheat at that time, but would have held it. Plaintiff would have placed said wheat in the commodity loan if he had been aware of what was going on. If Plaintiff had held his Curry County, New Mexico, produced wheat, he could have received a least $.45 (forty-five cents) per bushel more for his wheat than he did receive and this would have increased his income by $9,412.65 from his wheat sold in the year 1972. Similarly, producers with wheat on storage from a prior year's crop could have extended their loans without cost, which extension was available, to April 30, 1973, and acquired the higher price. Plaintiff has been and was damaged in this respect as were all other wheat farmers who did not hold

their wheat, but who sold it at harvest time (and the majority of farmers did sell their wheat when it was harvested), and between May 1, 1972, and September 1, 1973, and were likewise damaged in the same way. Plaintiff received no word from the U.S.D.A. concerning negotiations with, treaties or sales to Russia during this period of time. Plaintiff does his work on the farm and is not skilled and is not knowledgable in foreign affairs and international relationships and trades with foreign governments, nor are other wheat producers in Curry County, New Mexico. They rely mostly on Government information.

16. From the harvest of hard red winter wheat, farmers at the southern end of the wheat belt, Texas, New Mexico, and Oklahoma, sold their wheat for $1.25 to $1.35 per bushel. Based on the demand increase created by the grain needs of the Soviet Union, the prices received by Curry County, New Mexico, wheat producers for their wheat were substantially less than what the market price would have been except for the herein described unlawful acts of the Defendants.

Wheat Sale to Russia

17. The 1972 Russian wheat crop was a major failure. A severe winter with limited snow cover led to heavy winterkill of fall-planted grains in Russia. To compensate for this loss, the Soviets increased the planting of spring grains; however, spring-planted grains ran into a hot, dry summer.

18. Approximately 419,000,000 bushels of wheat, about 20 percent of the total 1972 American crop, had been purchased by the Soviets by early September, 1972. This massive increase in demand caused prices to increase from $1.30 or less per bushel in July, to a price of $2.50 or more per bushel in September.

19. Had the New Mexico wheat producers been made aware of the Russian wheat disaster, they would have held

their grain in storage until the market forces of competition had adjusted the wheat prices upward. There are adequate storage facilities available to handle and store the 1972 crop and the prior crops on storage during the subject period.

20. The United States Department of Agriculture and/or its employees had knowledge of the Russian wheat disaster prior to the time that Curry County, New Mexico, farmers harvested and/or sold their wheat. This information in full was given to the Continental Grain Company and was withheld in whole or part from said wheat producers. The United States Department of Agriculture and/or its employees had knowledge of the Russians' "stunning proposition" to purchase wheat in 1972. This information was similarly withheld from said wheat producers.

21. The Defendants, with prior knowledge of the Russian grain situation, violated the antitrust laws by conspiring to withhold market information that would have, if released, inflated the market price for wheat. This price-fixing conspiracy is illegal per se under Section 1 of the Sherman Act as interpreted by the Supreme Court in *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940). Further, said acts are an attempt to monopolize or to combine or conspire to monopolize the wheat trade or commerce, illegal per se under Section 2 of the Sherman Act.

Facts Showing Conspiracy

22. Continental Grain Company is the largest grain dealer in the United States, and handles a majority of the grain grown in Texas and New Mexico, both for domestic use and export. Continental Grain Company has for many years enjoyed a dominating position in the market place for wheat grain, both for domestic use and for export to other countries. Continental Grain Company has offices, employees and facilities throughout the world, in practically all nations in the world using and consuming wheat. Con-

tinental Grain Company has at all times referred to and maintained a close relationship to key employees in the United States Department of Agriculture charged with the responsibility of determining and knowing the world wheat situation, including Defendant Palmby. Through close relationship with the United States Department of Agriculture, employees and Palmby as an individual, it suppressed information concerning the extent of the above described international wheat shortage existing in Russia and the necessity of Russia having to obtain sizable quantities of wheat as a food for their people from the United States, and that other wheat producing countries would not be able to supply such grain on account of the extent of the drought condition and short supply existing in many areas of the world, including Russia. These facts, as well as the size of the pending massive wheat sale to Russia and purchase of grain therefor and other large international grain transactions, were suppressed and kept secret or released untimely and unlawfully as part of the conspiracy in order that Continental Grain Company could use its dominating position in the market place to assure that Continental Grain Company might buy grain from producers such as Plaintiff at a lower price. At the same time and later, Clarence Palmby in turn received certain benefits from Continental Grain Company. Said acts on the part of Clarence Palmby and other employees of the Department of Agriculture were outside and contrary to their respective authority and employment and were thus not acts of government.

23. The Defendant grain trade corporation and those working with said Defendant exported approximately 50 percent of the total grain exported out of the United States. A close relationship has been maintained between the defendant grain corporation and the employees of the Department of Agriculture, with Continental Grain Company taking the initiative. With this closeness and by working together, the Defendants were able to keep the market price suppressed until Defendant grain corporation had

acquired a substantial amount of grain destined to be sold and already sold to Russie.

24. A marketing team from the Department of Agriculture, led by Secretary Earl L. Butz, first went to Russia in April, 1972, to negotiate terms of trade for the possible sale of grain to the Soviet Union. This meeting was a follow-up to the grain sale that had been made by Soviet Minister of Agriculture, Vladimir Matskevich, when he visited the United States in December, 1971.

25. Included on the marketing team that went to Russia in April, 1972, with Secretary Butz were Clarence Palmby and Clifford V. Pulvermacher. Palmby at the time was Assistant Secretary for International Affairs and Commodity Programs for the Department of Agriculture. Pulvermacher was, at the time of negotiations with the Soviets, the Department's General Sales Manager.

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29. Clarence Palmby, who as Assistant Secretary for International Affairs and Commodity Programs went to Russia to negotiate terms of trade for a possible sale of wheat in April of 1972, knew at the time that he was leaving the Department to become Vice President of the Defendant, Continental Grain Company. Just before leaving for Russia, Palmby, on April 3 or 4, 1972, purchased a luxury cooperative apartment at 45 Sutton Place, New York, New York, valued from $90,000.00 to more than $100,000.00. The monthly maintenance cost for the apartment would run about $500.00 per month.

30. Palmby, described by Secretary Butz as being a man of modest means, made a large down payment on the apartment. In his application for credit, Palmby listed the four top officers of Continental Grain Company. Continental Grain Company's world headquarters are located in New York. Before acquiring this apartment, Palmby earned $38,000.00 a year at the Department of Agriculture.

31. Three days after signing the apartment purchase contract, Palmby was in Moscow as Assistant Secretary of Agriculture, negotiating the initial grain deal with Russia. On May 9, 1972, Palmby met with a high Soviet trade official in Washington to further discuss the grain deal. On May 12, 1972, Palmby informed Secretary Butz that he had received a firm offer of employment from Continental Grain Company, which he had decided to accept. Palmby resigned from the Department of Agriculture on June 7, 1972, and on June 8, 1972, he became Vice-President of Continental Grain Company.

32. The reported salary of Palmby with Continental Grain Company is $100,000.00 per year, plus expenses and other employment benefits, on a ten-year employment basis.

33. From March or early April, 1972, until June 7, 1972, Palmby held an employment contract with Continental Grain Company while at the same time serving as Assistant Secretary of Agriculture and leading the Government's negotiating team that eventually worked out the terms of the sale of wheat to Russia.

34. After leaving the Department of Agriculture, Palmby, as Vice-President of Continental Grain Company, on July 2, 1972, met with two members of the Russian team that had arrived to negotiate wheat purchases with Continental Grain Company. Present at this meeting was a Mr. Ziv from the Paris offices of Continental Grain Company. Three days after this meeting, July 5, 1972, Continental Grain Company concluded a 150-million-bushel wheat sale to the Soviet Union.

35. Besides the negotiations with Continental Grain Company, there were two periods of negotiations on wheat sales between representatives of the Soviet Union and representatives of the Defendant grain companies. The first meeting was held from June 29 through July 21; and the second trip was from July 31 until about August 18, 1972.

Soviet purchases of wheat from American companies during these two periods were as follows:

Company	*Wheat in Tons Purchased*	
	First Trip	Second Trip
Continental Grain Company	5,000,000	None
Cargill, Inc.	1,000,000	1,000,000
Louis Dreyfus Corp.	750,000	1,500,000
Cook Industries	600,000	300,000
Garnac Grain Co.	200,000	350,000
Bunge Corp.	None	600,000
Totals	7,550,000	3,750,000

Defendant Continental Grain Company was the only grain company trading with the Russians who made a profit, and did make substantial profits whereby it did monopolize the grain trade. Said excess profits were a result of the herein alleged conspiracy.

36. Each of the Defendants knew of the negotiations with Russia before any harvest of hard winter wheat. The United States-Soviet credit agreement was not announced until July 8, 1972, which was three days after Continental Grain Company's first sale. The full extent of the Soviet purchase did not become apparent until after the Russians returned to Moscow about August 21, 1972. Clarence Palmby, while an employee of the Department of Agriculture and Continental Grain Company, knew the size of the Russian appetite for wheat and withheld said information from the Department and the subject wheat producers as a part of the Defendants' conspiracy. Clarence Palmby, while an employee of the Department of Agriculture and Continental Grain Company, knew of the grain credit agreement with Russia that was announced July 8, 1972, and knew that Russia would take all the wheat thereunder in 1972 instead of over a three-year period and withheld said information from the Department and the subject producers as a part of the Defendants' conspiracy. Said acts of Defend-

ant Palmby were done individually or in conspiracy with other employees of the Department of Agriculture either directly or indirectly, at the instance of Palmby and Continental Grain Company.

37. It was mutually advantageous for the Defendant grain corporation to suppress any information it held on the wheat transactions with Russia at least until the said Defendant had acquired in the market sufficient amounts of wheat and wheat futures to satisfy its contractual obligations with Russia. The Defendant grain corporation with a close personal relationship with the Department of Agriculture was able through Defendant Clarence Palmby and others at his instance to suppress an official Government report completed August 18, 1972.

38. Some information concerning the Soviet buying did become known in the trade. As a result the domestic market price of wheat rose to $1.76 per bushel by mid-July and $1.78 per bushel by the time the Russians returned to Moscow. Subsequently, when the full extent of the Soviet purchases became known, the price rose to $2.50 per bushel.

39. The close relationship of the Defendant grain corporation with the Department of Agriculture is demonstrated by the flow of personnel from the Department into the said corporation and from the said corporation into the Department. Clarence Palmby had been Assistant Secretary of Agriculture until he resigned on June 7, 1972, to become Vice-President of Continental Grain Company. Carroll G. Brunthaver, who prior to taking employment with the Department of Agriculture had been employed as an associate research director for Cook Industries, a grain concern like Continental Grain Company, was Assistant Secretary of Agriculture for International Affairs during the 1972 Russian wheat deal and had been moved into said position only one week prior to the Russian deal. Brunthaver handled the export subsidy transaction for the wheat deal to Russia, and was fully informed of the massive

size of the Russian purchase from Continental on July 3, 1972. Carroll G. Brunthaver filled Clarence Palmby's position and was an old friend and protege.

Profits Made by Grain Companies

40. The Defendant, Continental Grain Company, made excessive profits on its sale of wheat to Russia in two ways. First, they made a profit represented by the difference between the low price paid to farmers and the higher price received in the sale to Russia. The second profit was in the form of a subsidy paid by the Government.

41. The Russians were able to buy wheat at the prevailing world price of $1.63 to $1.65 a bushel, with the Government of the United States paying the exporter a subsidy measured by the difference between the world and domestic prices. This subsidy, however, was not determined on the basis of the domestic price on the date of the sale. Instead, it was the domestic price on the day that the grain exporter registered the sale with the Department of Agriculture.

42. With knowledge that the domestic wheat prices would increase as information was released to wheat producers, the Defendant grain company sold its wheat to the Soviets and unlawfully postponed filing the notification of sale. Said acts of the Defendant Continental Grain Company are a per se violation of Sections 1 and 2 of the Sherman Act. For example, the subsidy paid on July 13 was 13 cents; however, as the domestic price continued to rise, a subsidy of 36 cents as being paid on August 14.

43. The Department of Agriculture during the latter part of August decided to suspend subsidy payments on wheat exports. Wheat dealers would, following their suspension, be required to compete in the world market on their own. Because of the shortage of wheat, however, the world price became the domestic price in the United States.

44. On August 24, 1972, Charles Pence, of the Department of Agriculture, telephoned Continental Grain Company to give it a "tip off" of the impending change in the wheat subsidy program. It was told not to assume that sales made after the close of business on August 23, 1972, would necessarily qualify for export subsidy payments. The Department of Agriculture then announced that exporters would be allowed an additional five days within which they could register sales made prior to August 24, and receive subsidy payments. During this five-day period a subsidy of 47 cents per bushel was paid for hard winter wheat.

45. During these last five business days, Continental Grain Company registered for subsidy payments a large number of bushels of wheat. Total subsidies paid during this period, most of them at 47 cents a bushel for wheat sold to Russia, amounted to more than 77 million dollars. The 166 million bushels of wheat registered during the special five-day period represented about 40 percent of the total amount of wheat sold to Russia—419 million bushels. Continental Grain Company received the largest benefit of any exporter, which was due to having unlawfully withheld the registry of said sales.

Antitrust Violations

46. Continental Grain Company entered into an agreement or conspiracy with Clarence D. Palmby and others unknown to Plaintiff at this time in restraint of trade or commerce among the several states and with foreign nations. Through this agreement, which provided special market information to Continental Grain Company and suppressed the information from being released to the public, the domestic market price for hard winter wheat was depressed. This being a price-fixing conspiracy, it is illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

47. The Defendants had knowledge that concerted action to suppress market information from wheat producers in order to keep prices low was contemplated and invited. With this knowledge, the Defendants gave their adherence to the scheme and participated in it. This is a price-fixing conspiracy illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

48. The Defendants agreed, reached some understanding or conspired among themselves and others unknown to Plaintiff to inflate the domestic market price for wheat after purchasing most of their needs for the Russian sale in order to increase their subsidy payments. This is a price-fixing conspiracy illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

49. The Defendants conspired among themselves and with the Secretary of the Department of Agriculture, Earl L. Butz, and other employees of the Department of Agriculture to preserve low wheat prices during the period of negotiations by the Defendant grain corporation with the Russians.

50. The Defendants, Continental Grain Company and Clarence D. Palmby, acted together in a common conspiracy which was intended to and did restrain trade and commerce among the several states and with foreign nations for their respective benefits to the detriment of producers of wheat and did by their so acting together and by their secretive dealings, as hereinabove set forth, enable Continental Grain Company to buy wheat for its own account, at and below what would have been the market value for such wheat and the price for which such wheat would have been sold except for the accomplishments by their said conspiracy in keeping secret the massive sales which was known by them but unknown to the farmers and producers of wheat grain. Such actions were predatory, anticompetitive and unfair practices made in bad faith and such conduct was inequitable and was in restraint of trade and was

not only an attempt to, but in fact did, monopolize the market in violation of law and was price fixing and illegal per se under Section 1 of the Sherman Act (U.S.C.A. § 1).

51. The Defendant, Continental Grain Company, did attempt to monopolize and hold for itself and its friends the opportunity to sell wheat to Russia and other foreign countries at higher prices and with a higher subsidy to the exclusion of other wheat dealers and producers by maintaining a blanket of secrecy concerning the above described large foreign wheat sale. The said Continental Grain Company did attempt to monopolize such trade in wheat with foreign nations and did monopolize such trade and did combine or conspire with Clarence Palmby, and others unknown to Plaintiff, to monopolize the above described sale of wheat to foreign countries in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C.A. § 2). The effect of such monopoly, conspiracy to monopolize and attempt to monopolize was to maintain the price of domestic wheat at a falsely low level to the injury and damage of your Plaintiffs herein. The other grain dealers who were not privileged to obtain and have the information which Palmby made available to Continental Grain (and Continental Grain Company made available to others unknown to Plaintiff) were unaware of the true demand for wheat and therefore did not offer and would not pay as much to your Plaintiffs as they would have paid had Plaintiffs not been the victims of the monopoly, attempt to monopolize, and combination and conspiracy to monopolize above described.

Injury to Plaintiff Wheat Producers

52. As a direct result of the Defendants' conspiracy to fix prices of wheat and monopolize as hereinafter described, the Plaintiff wheat producers were injured in their business or property as specifically described:

(a) The Plaintiffs lost the difference between what they actually received for their wheat and what they

would have received for their wheat except for the conspiracy to withhold information.

(b) The Plaintiffs lost the difference between what they actually received for their wheat and and what they would have received for their wheat except for the monopoly, conspiracy to monopolize and attempt to monopolize described hereintofore.

53. During the period May 1 through September 1, 1972, the Plaintiffs sold approximately 500,000 bushels of wheat at $1.35, 60,000 bushels of wheat at $1.40 and 40,000 bushels of wheat at $1.60. The Plaintiffs' claims range from approximately $10.00 to $10,000.00. The exact amount of Plaintiffs' claims may be determined after sufficient opportunity for discovery. The claim of Plaintiff John Spearman is one of the largest of the class. The damages to the class resulting from Defendants' antitrust violations is in excess of $300,000.00. The Plaintiffs should be awarded recovery threefold the damages sustained plus costs of suit, including reasonable attorney fees, as authorized by Section 4 of the Clayton Act (15 U.S.C.A. § 15).

54. The named Plaintiff, John Spearman, lost $9,412.65 as a direct result of the said unlawful acts of the Defendants.

Relief Requested

WHEREFORE, the Plaintiff prays:

(1) That the cause of action be certified as a class action as provided by Federal Rule 23;

(2) That this named Plaintiff be certified to represent the said class;

(3) That the Plaintiffs recover threefold the damages sustained by them plus costs of suit, including reasonable attorney fees, as authorized by Section 4 of the Clayton Act; and,

(4) That the Plaintiffs have such other and further relief as may be just and proper.

DATED: September 2, 1974.

GARRETT, HARTLEY & TATUM
By: /s/ MICHAEL T. GARRETT
Attorney in Charge

JURY DEMAND

COMES Now the named Plaintiff and demands, as provided by law, a trial by jury on each and every issue in this case.

/s/ JOHN H. SPEARMAN
Plaintiff

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF CURRY, ss:

JOHN SPEARMAN, on oath after having been duly sworn, states: that he is the named Plaintiff in the foregoing Complaint; that he has read said Complaint and knows the contents thereof; and, that to the best of his knowledge, information and belief, the statements and allegations therein are true and correct.

/s/ JOHN H. SPEARMAN
John Spearman

SUBSCRIBED AND SWORN To before me this 2nd day of September, 1974, at Clovis, Curry County, New Mexico, by John Spearman.

/s/ MICHAEL T. GARRETT
Notary Public
State of New Mexico

(SEAL)
My commission expires: 12-24-74

I hereby certify that I have (delivered) a copy of the foregoing pleading to opposing counsel of record this 3rd day of Sept. 1974.

/s/ MICHAEL T. GARRETT

Sherman Act

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 2.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. § 15.)